90-922

NO.

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1990

ANDREW D. SCHOLBERG, et. al.,

Petitioners

v.

AARON S. LIFCHEZ, et. al.,

Respondents

PETITION OF APPELLANTS/PROPOSED INTERVENORS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1.) Whether *Roe v. Wade* must be overruled?

2.) Whether the privacy rights announced by this Court in *Roe v. Wade* must be expanded to include the right to sell human prenatal offspring up until the moment of birth for purposes of experimenting on them or for harvesting their body parts?

3.) Whether, in light of the protection of women's freedom from unwarranted state intrusions into their reproductive decisions under the Fourth and Fourteenth Amendments, the analysis of *Roe v. Wade* to protect these same interests is unnecessary?

4.) Whether *Webster v. Reproductive Health Services* has modified or overruled *Roe v. Wade* within the meaning of I.R.S. Chap. 38, P. 81-21, thereby making prenatal humans persons within the meaning of Illinois law?

5.) Whether *Dred Scott v. Sandford* must be overruled?

6.) Whether, in light of the Thirteenth Amendment, prenatal humans or their body parts or tissues may be sold as chattel property from the moment of conception to the moment of birth?

7.) Whether federal courts lack subject matter jurisdiction to limit or abolish state personhood for purposes of state law?

8.) Whether, in light of the case or controversy requirement, federal courts lack subject matter jurisdiction to enjoin a state statute in toto when only part of the statute has been challenged?

9.) Whether the decision in this case, and the precedents of the Seventh Circuit, that the Seventh Circuit will

ignore questions of its subject matter jurisdiction and proceed to judgment on the merits must be overruled?

10.) Whether the Court of Appeals erred in affirming the orders of the District Court?

11.) Whether the Illinois Fetal Experimentation Act is facially void for vagueness?

THE PARTIES

ANDREW D. SCHOLBERG, as Expectant Father and Next Friend of BABY SCHOLBERG, on behalf of BABY SCHOLBERG individually and as a proposed representative of a class of all unborn babies in the State of Illinois, presently conceived or to be conceived in the future,

Petitioners/Appellants,
Proposed Intervenors,

v.

AARON S. LIFCHEZ, on behalf of all physicians who presently specialize in reproductive endocrinology in the State of Illinois, on behalf of all physicians who perform genetic testing on pregnant women, and on behalf of all patients desiring these medical services,

Respondents/Appellees,
Plaintiffs,

and

NEIL F. HARTIGAN, Attorney General of the State of Illinois, in his official capacity, and JACK O'MALLEY, State's Attorney for the County of Cook, State of Illinois, in his official capacity and as a representative of the class of all State's Attorneys of the 102 counties of the State of Ilinois,

Respondents/Appellees,
Defendents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL

Constitution of the United States of America

CASES

United States Supreme Court

United States Court of Appeals
For the Seventh Circuit

Other Circuits

United States District Court

Northern District of Illinois

Other Districts

FEDERAL RULES

Of Civil Procedure

STATE

Illinois

Cases

STATUTORY

OTHER STATES

OTHER LEGAL AUTHORITIES

THE RECORD

MEDICAL AND TECHNICAL

MISCELLANEOUS

OPINIONS BELOW

1.) **Judgment of the Court of Appeals.** (Appendix A.)

2.) **Order and Opinion of the Court of Appeals.** *Lifchez v. Hartigan,* 914 F.2d 260 (1990) (Appendix B.)

3.) **Request for Jurisdictional Memorandum by the Court of Appeals.** (Appendix C.)

4.) **Notice of Appeal.** (Appendix D.)

5.) **Denial of the Motion to Intervene.** (Appendix E.)

6.) **Reasons Stated in Open Court for Denying the Motion to Intervene.** (Appendix F.)

7.) **Judgment of the District Court.** (Appendix G.)

8.) **Order and Opinion of the District Court.** *Lifchez v. Hartigan,* 735 F.Supp. 1361 (N.D. Ill. 1990). (Appendix H.)

JURISDICTION OF THIS COURT

This case was originally filed as a class action suit pursuant to 42 U.S.C. Sect. 1983 and 28 U.S.C. Sects. 1343 and 1392(a). In 1986 the plaintiffs filed a facial void for vagueness challenge in a second amended complaint under 42 U.S.C. Sects. 1983 and 1988 and 28 U.S.C. 2201 and 2202. The date of entry of judgment in the District Court granting the plaintiffs' motion for summary judgment was April 26, 1990. A motion to intervene as of right for purposes of maintaining a class action and for purposes of taking an

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1.) The thirtieth day from the date of the order dated April 26 fell on Memorial Day weekend, and under Federal Rule of Appellate Procedure 26(a) we had until the next business day to file the appeal, which we did. *See, United Mine Workers, Intl. Union v. Dole,* 870 F.2d 662 (DC Cir. 1989); *Funbus Systems, Inc. v. California Public Utilities Com.,* 801 F.2d 1120 (9th Cir. 1986).

appeal was filed on May 22, 1990; this motion was denied on May 24, 1990. Both the judgment of April 26 and the denial of the motion on May 24 were appealed in this case. The notice of appeal was filed in the Seventh Circuit on May 29, 1990. The notice was timely.[1] The jurisdiction of the Court of Appeals was based on 28 U.S.C. 1291. The Seventh Circuit summarily affirmed the District Court on September 10, 1990. Certiorari is being sought under 28 U.S.C. 1254 (1) and 1254 (2).

2.) CONSTITUTION OF THE UNITED STATES OF AMERICA
FIFTH AMENDMENT (in pertinent part): No person shall be... deprived of life, liberty, or property, without due process of law... .

THIRTEENTH AMENDMENT (in pertinent part): Section One: Neither slavery no involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

FOURTEENTH AMENDMENT (in pertinent part): Section One: No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3.) I.R.S. CHAPTER 38 ¶ 81-21 §1: It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the long-standing policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that long-standing policy of this State to protect the right to life from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution: Fifth, Thirteenth, and Fourteenth Amendments.[2]

Illinois Statutes: I.R.S. Chap. 38, ¶ 81-21, 81-26(7), and 81- 68.1 [3]

STATEMENT OF THE CASE

On April 26, 1990, the District Court for the Northern District of Illinois struck down the Illinois Fetal Experimentation Act, which prohibits the sale of prenatal human offspring [4] and which prohibits experimenting on them unless such experiment is therapeutic to the prenatal offspring.

(*Footnote 3 continued*) §2: It is the further intention of the General Assembly to assure and protect the woman's health and the integrity of the woman's decision whether or not to continue to bear a child, to protect the valid and compelling state interest in the infant and unborn child, to assure the integrity of marital and familial relations and the rights and interests of persons who participate in such relations, and to gather data for establishing criteria for medical decisions. The General Assembly finds as fact, upon hearings and public disclosures, that these rights and interests are not secure in the economic and social context in which abortion is presently performed.

I.R.S. CHAPTER 38 ¶ 81-26(7): No person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced. Intentional violation of this section is a Class A misdemeanor. Nothing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.

R.S. CHAPTER 38 ¶ 81-68.1: If any provision, word, phrase or clause of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this Act which can be given effect without the invalid provisions, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this Act are declared to be severable.

The plaintiffs were a class of physicians who perform services pertaining to reproductive medicine, including in vitro fertilization. The defendants were the Attorney General of the State of Illinois and the State's Attorney for Cook County in their official capacities. The State's Attorney for Cook County was named as a representative of a class of Illinois State's Attorneys for all of the counties in the State. Cross motions for summary judgment were filed.

In June of 1989 the District Court stayed further proceedings in the case to assess what action should be taken following the announcement of this Court's decision in *Webster v. Reproductive Health Services*, which came one month later. The reason is that Illinois provides by statute that if *Roe v. Wade* is ever overruled *or modified*, prenatal humans in the State of Illinois shall be deemed persons for purposes of State law. (Emphasis supplied.) *Webster* expressly modified *Roe*. Three status hearings were held following *Webster*. The attorneys for the State never brought to the attention of the District Court the fact that this statutory provision exists or that *Webster* had expressly modified *Roe*. At the second and third hearings they did not even show up.

The District Court denied the defendants' motion and granted the plaintiffs' motion, permanently enjoining enforcement of the statute. The District Court stated that the privacy rights announced in *Roe v. Wade* mandated the result which it reached.

The Court found the entire statute facially void for vagueness despite the fact that the Court itself makes reference throughout its opinion to various applications which would

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4.) The term prenatal human is used throughout in an attempt to describe the lives in question in a nonconclusory manner. "Fetus" has a dehumanizing connotation; "unborn child" connotes the conclusion of personhood. All will no doubt agree, however, that these entities which we are speaking of are prenatal and that they are human at least to the extent that they are the prenatal lives of the human race.

be constitutional, and despite the fact that no one at any time had challenged the sale provision of the statute. *Lifchez v. Hartigan*, 735 F.Supp. 1361, 1365-1370 (N.D. Ill. 1990). The statute has a severability clause.

The petitioners moved to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) in the District Court for purposes of maintaining a class action and for purposes of taking an appeal when it became clear that the defendants would not appeal. The basis for taking the appeal was the need to preserve the deterrent effect of the private causes of action which can arise in Illinois under a criminal statute; it was not for the purpose of enforcing the criminal or civil provisions which the State can assert on its own behalf under a criminal statute, nor was it for the purpose of forcing the State to do so on its own.

The appeal was filed and the respondents moved to dismiss the appeal, alleging that this Court's holding in *Diamond v. Charles*, 476 U.S. 54 (1986), governs. The petitioners responded with a twenty-eight page memorandum. The Court then ordered another memorandum on the jurisdictional issues, and the petitioners filed an eighty-eight page memorandum. Then, before before briefing, the Seventh Circuit affirmed the District Court in toto in an unpublished opinion dated September 10, 1990.

SUMMARY OF ARGUMENTS

In 1973 Dr. Peter A.J. Adam announced that he had severed the heads of twelve aborted prenatal humans age twelve to twenty weeks of gestation and had kept them alive with fluids and a pump. He then performed experiments on them. In response to objections concerning the ethical implications of such practices he replied, "... once society has declared the fetus dead and abrogated its rights, I don't see an ethical problem."

If the order of the District Court is allowed to stand it will be legal for someone who wishes to experiment on prenatal human offspring to insist that they be Jewish babies only, as

the Nazis did at Auschwitz. If someone wants to be a broker for prenatal humans, their body parts, or their tissues, it will be legal for that person to insist that they be black babies only, as the slave owners did in the 1800's. If the order of the District Court is allowed to stand, racism, sexism, and every form of invidious discrimination will be fair game for anyone who is willing to restrict his activities to those members of humanity who are the most helpless.

The District Court strikes down the attempt by the people of the State of Illinois to protect prenatal human offspring. The Fifth Circuit has recently done the same thing. The prenatal humans of the State of Illinois, and of the several states, now lie openly exposed to such attacks. Only the certiorari review power of this Court stands in the way.

The District Court's expansion of the privacy rights announced in *Roe v. Wade* to now include the right to experiment on one's prenatal human offspring no matter what the consequences might be to such a child post-natally, and to now also include the right to sell one's prenatal offspring or the body parts thereof, illustrates the need to overrule *Roe v. Wade* expressly.

The District Court abandoned the case or controversy requirement for federal jurisdiction. The sale provision was never even challenged; and the statute has a severability clause.

The District Court's order abandons this Court's doctrines regarding a facial void for vagueness challenge and expands it to include statutes which have admittedly constitutional applications.

Federal courts lack subject matter jurisdiction to compromise state personhood for purposes of state law.

Prenatal human offspring in the State of Illinois are nonjoined indispensable parties to this case; the District Court had no personal jurisdiction over them.

The petitioners ask the Court to overrule *Roe v. Wade* and the *Dred Scott* decison of 1857. If the Court does not overrule *Roe* the petitioners ask that the Court either find that *Webster* has modified *Roe* to the extent that it makes the Illinois statutory provision for prenatal personhood operative, or that the Court so modify *Roe* now as to make that provision operative.

Federalism, an invasion of state sovereignty without subject matter jurisdiction, an abandonment of the case or controversy requirement for federal jurisdiction, an expansion of *Roe v. Wade* to allow the sale of prenatal humans offspring for purposes of experimenting on them or for harvesting their body parts are what this case is all about; these issues are inextricably linked.

Ultimately the petitioners seek dismissal of the case.

ARGUMENTS

I. THE DISTRICT COURT'S EXPANSION OF ROE V. WADE TO INCLUDE THE RIGHT TO SELL ONE'S PRENATAL OFFSPRING OR EXPERIMENT ON THEM ILLUSTRATES THE NEED TO OVERRULE ROE V. WADE EXPRESSLY.

The District Court found that its order was mandated by necessary expansion of the privacy rights of a woman under *Roe v. Wade*, 410 U.S. 113 (1973).[5] The right to privacy now includes the right to sell one's prenatal offspring for purposes of experimenting on them or for harvesting their various body parts. The right to control one's own body now becomes the right to sell one's offspring to have things done

5.) *See* 735 F.Supp. at 1376-1377.

to it outside of one's body; it then includes the right, after receiving payment for letting this be done to the child, to abandon the child after birth by leaving it with the state adoption agency. Not all women who allow such things to happen to their offspring will choose to abort once such a deed is done to a nine-month fetus, for childbirth at that point would be safer than abortion.

The sober warnings of the dissenting justices on January 22, 1973, seem mild compared to the harsh reality of what has happened between then and now.[6]

Sadly, we must note that the reasoning of the District Court correctly follows *Roe*. We therefore respectfully ask that *Roe* be overruled expressly.

A. In Light Of The Protection Of Women's Reproductive Decisions By The Fourth And Fourteenth Amendments, The Analysis Of Roe v. Wade To Protect These Interests Is Unnecessary.

An unwarranted state intrusion into a woman's reproductive decisions, such as a law forcing women to undergo abortions due to an overpopulation problem, would be unconstitutional even without *Roe*. As a concurring opinion said in *Cruzan v. Director, Missouri Dept. of Health,*

> "...Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause." [7]

And contrary to the reasoning employed by Solicitor General Fried at the oral argument of *Webster v. Reproductive Health Services*[8], the analysis used to protect this interest

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6.) 410 U.S. at 221-223.

7.) 110 S.Ct. at 2856 (O'Connor, J., concurring), (citing *Winston v. Lee*, 470 U.S. 753, 759 (1985) and *Schmerber v. California*, 384 U.S. 757, 772 (1966)).

8.) Tr. of Oral Arg., 109 S.Ct. 3040 (1989), # 88-605, at 21-22.

involves basic Fourth Amendment reasoning,[9] and requires no excursion into substantive due process.

II. THE ORDER OF THE DISTRICT COURT CONSTITUTES AN ABANDONMENT OF THE CASE OR CONTROVERSY REQUIREMENT BY ENJOINING IN TOTO A STATE STATUTE WHICH HAS BEEN CHALLENGED ONLY IN PART.

Eight years ago the Seventh Circuit went on record as saying that in considering a motion to intervene as of right it would ignore questions of its subject matter jurisdiction in proceeding to judgment.[10] Now it has done so again in this case. But the weight of authority stating that questions of subject matter jurisdiction are threshold questions which must always be addressed at any time, sua sponte if need be, is so overwhelming that these two cases in the Seventh Circuit may well be the only ones at any level of the federal court system which have ever said otherwise.[11]

The Emergency Court of Appeals has said that in any discussion of jurisdictional issues, the first and most impera-

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9.) *See*, note 7, *supra*.

10.) *U. S. v. South Bend Community School Corporation*, 692 F.2d 623, 628, n. 6 (7th Cir. 1982)

11.) *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986) (noting that this is of particular importance when a constitutional issue is presented), reh. den. 476 U.S. 1132; *In Re Rini*, 782 F.2d 603 (6th Cir. 1986); *In Re Miscott Corp.*, 848 F.2d 1190 (4th Cir. 1988); *In Re Martin-Trigona*, 763 F.2d 135 (2nd Cir. 1985); *U.S. v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), reh. den. 796 F.2d 1478, cert. den. *Board of Trustees of Alabama State University v. Alabama State Board of Education*, 479 U.S. 1085; *Figueroa-Rodriquez v. Aquino*, 863 F.2d 1037 (1st Cir. 1988); *Minnesota Chippewa Tribe Red Lake Band v. U.S.* 768 F.2d 338 (Fed. Cir. 1985); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988); *Othman v. Globe Indem. Co.*, 759 F.2d 1458 (9th Cir. 1985); *Page v. Schweiker*, 786 F.2d 150 (3rd Cir. 1986); *Hahn v. U.S.*, 757 F.2d 581 (3rd Cir. 1985); *U.S. Dept. of Energy v. West Texas Marketing Corp.*, 763 F.2d 1411 (Em.App. 1985); *Federal Trade Com'n v. Owens-Corning Fiberglas Corp.*, 853 F.2d 458 (6th Cir. 1988), cert. den. *Roofing Corporation v. Owens-Corning Fiberglas Corporation*, 109 S.Ct. 1128.

tive question is that of the competency of the court over the subject matter. For if there is no jurisdiction over the subject matter, other considerations are immaterial.[12] We squarely addressed all of the issues pertaining to subject matter jurisdiction in an eighty-eight page memorandum and in a twenty-eight page memorandum. But the Seventh Circuit never addressed these issues in proceeding to judgment.

We submit that the federal courts lack subject matter jurisdiction to enjoin a statute in toto when only part of the statute is challenged, and that this is at least the case with respect to statutes which have a severability clause, as this statute does,[13] for in such cases there is no case or controversy with respect to the unchallenged provision.[14] At no point in the proceedings did the plaintiffs challenge the sale provision of the Fetal Experimentation Act. Thus, it was error for the Seventh Circuit to uphold the order of the Distict Court on this point.

In Illinois a severability clause leaves the remainder of the statute intact.[15] Significantly, all other cases which have held as unconstitutional various provisions of the Illinois Abortion Act (of which the Fetal Experimentation Act is a part) have struck down only that part of the statute which was challenged, and have left the remainder intact.[16]

12.) *U.S. Dept. of Energy v. West Texas Marketing Corp.*, 763 F. 2d 1411 (Em. App. 1985).

13.) I.R.S. Chap. 38, ¶ 81-68.1, *See* note 3, *supra*.

14.) *See, Diamond v. Charles*, 476 U.S. 54 (1986); *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc.*, 454 U.S. 464, 471-476 (1982); *Muskrat v. U.S.*, 219 U.S. 348 (1911); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

15.) *Commercial Nat. Bank of Chicago v. City of Chicago*, 432 N.E.2d 227, 89 Ill.2d 45 (1982); *City of Carbondale v. Van Natta*, 338 N.E.2d 19, 61 ILL.2D 483 (1975); *Livingston v. Ogilvie*, 250 N.E.2d 138, 43 Ill.2d 9 (1969) (valid and invalid parts can even be in the same sentence).

16.) *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988); *Diamond v. Charles*, 749 F.2d 452 (7th Cir. 1984); *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980); *Wynn v. Scott*, 449 F.Supp. 1302 (N.D. Ill. 1978); *Wilczynski v. Goodman*, 73 Ill.App.3d 51, 391 N.E.2d 479 (1st Dist., 2nd Div. 1979).

III. THE ORDER OF THE DISTRICT COURT CONSTITUTES AN ABANDONMENT OF THIS COURT'S DOCTRINES OF FACIAL VOID FOR VAGUENESS CHALLENGES AND EXPANDS THE SCOPE OF SUCH CHALLENGES TO STATUTES WHICH HAVE ADMITTEDLY CONSTITUTIONAL APPLICATIONS.

In a facial void for vagueness challenge a negative must be established. The law in question will be upheld unless it is clear that under no set of facts can the law be constitutionally valid; and this Court has expressly noted that it has never recognized an overbreadth doctrine outside of a First Amendment context.[17]

Nothing in the record or in the opinion of the District Court establishes the negative required to sustain this challenge. The prohibition against the sale of prenatal humans is certainly not vague, and even the District Court makes reference all throughout is opinion to various applications of the law which clearly fall within its intended and permissible scope.[18]

Unfortunately, this case is not the only one in which an expressed desire of the people to prevent fetal experimentation has been struck down under a misapplication of this Court's void for vagueness doctrines. Recently the Fifth Circuit reached the same result in construing a Louisiana statute as the Seventh Circuit has done here,[19] though prior to that the District Court in Louisiana had reached the opposite result in a challenge to an earlier version of that statute.[20]

In *Margaret S. I* the District Court rejected the facial void for vagueness challenge because it understood the difference in medical practice between an "experiment" on the one

17.) *U.S. v. Salerno*, 481 U.S. 739, 745 (1987); *Schall v. Martin*, 467 U.S. 253, 269, n. 18 (1984); *New York v. Ferber*, 458 U.S. 747, 766-77 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

18.) *See espec.* 735 F.Supp. at 1365-1370.

19.) *Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir. 1986). (*Margaret S.III*).

hand, in which new techniques are tried out for the sake of obtaining raw data, and a "test" on the other hand, such as taking a blood count or analyzing a urine sample for the purpose of diagnosing a patient and determining the best course of treatment.

The District Court in the case at bar rejected the reasoning of the District Court in *Margaret S. I*, as did the Fifth Circuit in *Margaret S. III*. The failure of the District Court in the case at bar, and the failure of the Fifth Circuit, to understand this basic, simple principle of medicine illustrates as clearly as any case does that the federal courts lack the competance to make themselves into bio-medical review boards. Lacking the expertise to understand even simple principles of science, the federal courts are fair game for anyone who wants to pull the wool over the courts' eyes and make them feel compelled to strike down state laws on the basis of imaginary flaws or a smokescreen of technically elaborate arguments.

IV. FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION TO COMPROMISE STATE PERSONHOOD FOR PURPOSES OF STATE LAW.

This Court stated in *Dred Scott* that the states had reserved to themselves exclusively the right to establish personhood for purposes of state law.[21] The statement was made in dictum, but it was unquestioned at the time. Unfortunately it was not brought to this Court's attention at the time of *Roe v. Wade*. The unfortunate result is that this Court in *Roe* issued a ruling pertaining to prenatal natural personhood which it did not have subject matter jurisdiction to make.

The mere fact that this Court has exercised jurisdiction when it had none does not somehow render a similar attempt

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20.) *Margaret S. v. Edwards*, 488 F.Supp. 181 (E.D. La. 1980). (*Margaret S. I.*)

21.) 60 U.S. 393, 426 (1857)

at exercising such jurisdiction valid for later cases. As this Court has said,

> "Even as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silencio."[22]

Thus, although we ask this Court herein to overrule the analysis of *Dred Scott*, we also ask it to recognize that there was a statement made in dictum which expresses an accurate statement of the law both now and then with respect to the authority of the federal courts to compromise state personhood for purposes of state law.

The State of Illinois provides by statute that prenatal humans in the State are persons for purposes of State law.[23] The only qualification of such personhood is the holdings of this Court; the statute expressly provides that if *Roe v. Wade* is ever overruled *or modified*, legal personhood for prenatal humans in the State thereby takes effect. (emphasis supplied).

We submit that *Webster v. Reproductive Health Services* did modify *Roe* in a manner which now makes prenatal humans in the State of Illinois persons for purposes of State law.[24] If this Court concludes that *Webster* did not in fact do so, we ask this Court to so overrule or modify *Roe* now.

If the authority of the states to establish personhood for purposes of state law has been modified or abolished since *Dred Scott*, it would have to have been done by an amendment, specifically the Fourteenth Amendment. For as Publius pointed out, a sovereign right of the states can not be taken from them by implication.[25] Further, it has never been in doubt that the federal government is to be a government

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22.) *Nathanson v. Labor Board*, 344 U.S. 25, 38 (1952).
23.) *See* I.R.S. Chap 38, ¶ 81-21. (note 3, *supra*).
24.) 109 S.Ct. 3040, 3055-3058 (1989).

having only those limited powers which are specifically granted to it; for instance, Article Seven of the First Draft of the Constitution (August 6, 1787) differs very little from Article One, Section Eight of the Constitution as it was ratified and still exists today.

Are the respondents prepared to say that *Dred Scott* went too far to the extent that it *would* allow an individual the right to have his interests protected by the law? Are they prepared to say that *Dred Scott did not go far enough* in denying an individual standing to protect his interests? Such a submission, if it were made, would have to aver that this is accomplished by the Fourteenth Amendment; such a submission, if it were made, would be untenable on its face.

V. WE ARE NONJOINED INDISPENSABLE PARTIES TO THIS CASE.

The questions pertaining to one's status as an intervenor as of right and a nonjoined indispensable party are, analytically, much the same in most respects, and so we discuss them together.[26]

The interests of prenatal humans as persons in this case falls within the meaning of the type of interest which makes one a nonjoined indispensable party to a case.[27] The question then is whether prenatal humans are persons in contemplation of law or not; for if they are their interests as nonjoined indispensable parties can be recognized.

25.) "(An exercise of sovereignty by the Union not expressly delegated to it would be) an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty...(and)...all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor..." *The Federalist*, No. 32 (Hamilton); "...the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction." *The Federalist*, No. 40 (Madison); and see, *generally*, *The Federalist* No's. 41 (Madison), 44 (Madison), and 45 (Madison).

A. Prenatal Humans Are Persons Within The Meaning Of The United States Constitution.

1. Federal Personhood For Purposes Of Defending State Law Personhood Is Inherent In The Federal Nature Of The United States Constitution.

This Court in *Dred Scott* did not say just exactly how standing to defend one's state law personhood against a federal intrusion would arise. It would certainly arise at least under the Fifth Amendment. But the indefeasibility of state law personhood does not depend upon a grant of this right by the federal constitution to the states; rather, this Court noted that this is a sovereign right which the states reserved to themselves. (*See* note 21, *supra*.) Thus, standing to defend one's state law personhood against an intrusion by a federal court is inherent in the federal nature of the U.S. Constitution. It would have existed even prior to the adoption of the Fifth Amendment and the other provisions of the Bill of Rights on December 15, 1791.

2. Prenatal humans are persons within the meaning of the Thirteenth Amendment.

The Thirteenth Amendment does not use the word "person", but it does use the word "slavery".[28] And one of the definitions of the word slavery is the ownership of a human being as chattel property.[29]

26.) *New York State Association For Retarded Children, Inc. v. Carey*, 438 F. Supp. 440 (D.C. NY 1977); *Christy v. Hammel*, 87 F.R.D. 381 (D.C. PA 1980); *National Wildlife Federation v. Hodel*, 561 F. Supp. 473 (E.D. Ky. 1987).

27.) *California v. Arizona*, 440 U.S. 59 (1979); *Lumbermen's Mutual Casualty Co. v. Elbert, 348 U.S. 48 (1954); United Shoe Machinery Corp. v. U.S.*, 258 U.S. 451 (1922); *Niles-Bement Co. v. Iron Moulders Union*, 254 U.S. 77 (1920); *Swan Land and Cattle Co., v. Frank*, 148 U.S. 603 (1893); *Kendig v. Dean*, 97 U.S. (7 OTTO) 423 (1876); *Railroad Co. v. Orr*, 85 U.S. (18 WALL.) 471 (1873); *Ribon v. Railroad Companies*, 83 U.S. (16 WALL.) 446 (1872); *Shields v. Barrow*, 58 U.S. (17 HOW.) 130 (1854); *Mechanics Bank v. Seton*, 26 U.S. (1 PET.) 299 (1828); *Mallow v. Hinde*, 25 U.S. (12 WHEAT.) 193 (1827).

28.) *See* note 2, *supra*.

29.) Webster's Ninth New Collegiate Dictionary (1987).

The Thirteenth Amendment is implicated in two ways. First, one obviously unintended consequence of *Roe* is that prenatal humans now fit every legal definition of the word "property".[30]

Thus, under *Roe* human beings are once again deemed to be chattel property. Every pregnant woman in the United States is rendered a slave owner; she may keep or dispose of her prenatal offspring for any reason at all, or for no reason at all. The Thirteenth Amendment is effectively overruled by *Roe*.

Second, the fetal experimentation law found unconstitutional in this case prohibits one of the most patent badges and incidents of slavery: the sale of a human being.

Even if the court does not agree that prenatal humans are persons within the Thirteenth Amendment for all purposes, we submit that they are such persons to the extent that some use or sale of their body parts could affect them postnatally. As the plaintiffs/appellees noted earlier in this case, under Illinois tort law one may be a person prenatally for purposes of injuries sustained during that period if the effects continue postnatally.[31] We submit that to deny prenatal humans such a recognition of their rights with respect to the Thirteenth Amendment would cause the intended scope of that amendment to be diminished, something which can be done properly only through the constitutional amendment process.

Pregnancies today can be initiated for profit. The recent developments in the treatment of Parkinsonism and Alzheimer's Disease with brain cells from prenatal humans provide such a market by themselves. A mother can also sell various organs of her prenatal offspring for transplant into

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30.) Dukeminier and Krier, Property, 5 and 58 (1981). Black's Law Dictionary (5th ed.) ("property" and "property right"). 63A Am.Jur.2d Property sect. 1-3.

31.) Plaintiff's Memorandum in Support of Their Motion For Summary Judgment at 18, n.25; docket no. 146, filed Jan. 7 1988 (citing *Renslow v. Mennonite Hosp.*, 67 Ill.348, 367 N.E.2d 1250 (1977).)

another child, and then leave the child with the state adoption agency after birth.

A prenatal human in the ninth month of development can be the nonconsenting donor to a child born after eight months of gestation. One child would be a person, yet the other would not. This is not law; it is only madness disguised as law.[32] Dr. Hans O. Tiefel points out that the reason scientists are so eager to experiment on prenatal human life is that the fetus is life and a Homo sapien. "Fetuses are the last of the unemancipated," he says.[33]

In 1973 Dr. Peter A.J. Adam announced that he had severed the heads of twelve aborted prenatal humans age twelve to twenty weeks of gestation and had kept them alive with fluids and a pump in order to perform experiments on them pertaining to carbohydrate metabolism. In response to objections concerning the ethical implications of such practices he replied, "... once society has declared the fetus dead and abrogated its rights, I don't see an ethical problem."[34]

The order of the District Court in the instant case strikes down the attempt by the people of the State of Illinois to protect prenatal human offspring against such wholesale barbarism. The Fifth Circuit has recently done the same thing. The prenatal humans of the State of Illinois, and of the several states, now lie openly exposed to such attacks. Only the certiorari review power of this Court stands in the way.

These experiments were performed in Helsinki. *Roe v. Wade* removed whatever barriers stood in the way of doing such things here. But apparently our cultural objections to such things prevented most such practices from being performed here for the first ten years following *Roe*.

32.) *See*, Levine, *Help From the Unborn*, Time, Jan. 12, 1987 at 62. Gorman, *A Balancing Act of Life and Death*, Time, Feb. 1, 1988 at 49.

33.) Tiefel, *The Cost of Fetal Research: Ethical Considerations*, The New England Journal of Medicine, Jan. 8, 1976 at 86.

34.) Medical World News, *Post-abortion Study Stirs Storm*, June 8, 1973, p. 21.

For instance, in 1983 Dr. Alan Trouson and Prof. Carl Wood of the artificial human reproduction team at Melbourne's Queen Victoria Medical Center in Australia said they had received requests to grow human embryos to be harvested for spare parts and to have their brain cells used to treat Parkinson's disease and Alzheimer's disease. The two approved of this practice, but said that the one thing standing in their way was the fact that society was not ready for that yet.[35]

But by January, 1990, objections in the medical community of the United States to using fetal tissues for treating Parkinsonism or other diseases had largely disappeared, and an article appeared in the Journal of the American Medical Association outlining recommended guidelines to be followed in using such tissues. The article approved of the attempted use of fetal tissue which has taken place so far, and offered the proposed guidelines in order to encourage a more favorable climate for further developing such uses.[36]

3. Prenatal Humans Are Persons Within The Meaning Of The Fourteenth Amendment.

a. The Roe birth requirement is unsound in principle and unworkable in practice.

i. Roe v. Wade is on even more of a collision course with itself now than it ever was.

Contrary to what the dissent said in *Webster v. Reproductive Health Services, Roe v. Wade* is on even more of a collision course with itself today than it was when *Akron v. Akron Center for Reproductive Health* was decided. [37]

35.) Tucson Citizen, Dec. 14, 1983, Sect. A, at 7, col 1.

36.) Council on Scientific Affairs and Council on Ethical and Judicial Affairs, *Medical Applications of Fetal Tissue Transplantation*, Journal of the American Medical Association, 263(4): 565-70, Jan. 26, 1990.

37.) *See Webster*, 109 S. Ct. at 3075-3076, n. 9 (Blackmun, J., concurring in part and dissenting in part) (making reference to *Akron*, 462 at 459 (O'Connor, J., dissenting) (1983).).

Human embryo transfer is the prime example of this. Live births have already been reported from this technique. It involves taking an embryo during the first few days following conception from the womb of one woman and transferring the embryo to the womb of another woman. This is possible because during the first few days following conception the placenta, which attaches the prenatal offspring to the mother, has not yet formed. Once the placenta is formed, an embryo transfer can not be achieved.[38] The plaintiffs/appellees themselves made reference to this technique in the District Court.[39]

Does an embryo transfer constitute a live birth within the meaning of the Supreme Court's abortion decisions—more than mere momentary existence outside of the womb, albeit sustained with artificial aid—so that the prenatal life is a person with respect to the original mother? [40] And if that is so, is this life simultaneously not a person with respect to the second mother?

To this it might be objected that the "obvious" reason that this would not constitute a live birth within the meaning of the Court's decisions is the biological fact that the prenatal human still can not live outside of at least some person's womb. But this presents yet another interesting question.

If, as the Court made clear in *Roe*, the biological facts of prenatal development are irrelevant in a determination of prenatal personhood,[41] why would these facts then suddenly become relevant to deprive prenatal humans of their status as persons which they qualify for under the wording of the Court's own opinions?

38.) N.Y. Times, Jan. 8, 1984, sect. 6, at 42, col. 1.

39.) Plaintiffs' Memorandum in Support of Their Motion For Summary Judgment at 3-4, notes 4 and 6, and at 24-25. Docket No. 146; filed Jan. 7, 1988; Plaintiffs' Response In Opposition to Defendants' Motions for Summary Judgment at 18-19. Docket No. 150; filed Feb. 9, 1988.

40.) *See, Colautti v. Franklin*, 439 U.S. 379, 387 (1979).

41.) 410 U.S. 158-160.

To the Court in *Roe* personhood was strictly a legal fiction, completely divorced from the underlying biological facts of prenatal development. If on the one hand that is true, then with the rise of embryo transfer technology, such a transferred embryo now meets the Court's own criteria under a strictly legal fiction analysis for being entitled to the status of personhood, at least with respect to any rights asserted on its behalf against the original mother, if not with respect to the second mother.

If on the other hand we must find that the biological facts of prenatal development are indeed relevant to a determination of personhood, there is simply no reasonable basis for denying prenatal humans the status of personhood. And to say that the biological facts of prenatal development are not relevant to establish personhood, but that simultaneously they are relevant to take away such personhood under the wording of the Court's own opinions, suggests a double standard.

Embryo transfer puts yet another curious twist in *Roe*. The Court said that a state's interest in prenatal life becomes compelling at viability.[42] The Court has deemed viability to be a status which is based upon the underlying biological facts of prenatal development, and is not a legal fiction.[43] But what does this mean in light of the rise of embryo transfer technology? If, as a matter of medical practice, the early embryo is now able to live outside of the first mother's womb, albeit with artificial aid—the womb of the second mother, does this mean that the states have a compelling state interest at least with respect to the asserted rights of a mother during the first few days following conception in any pregnancy, before the placenta forms? For in such cases the embryo is "viable", at least according to the Court's statements concerning viability. And does the state's compelling interest depend on whether the mother has undergone, or will undergo, an embryo transfer procedure? Does the state then lose its compelling interest when the placenta

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42.) *Roe*, 410 U.S. at 163.

43.) *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 63-65 (1976).

is formed and the prenatal human attaches itself to a given womb?

The problems do not stop here. Embryo transfer between species has already been successfully achieved in lower animals.[44] The possibility exists that it may someday be applicable to humans.[45] The wombs of several animals are large enough to gestate a prenatal human.

Would a prenatal human in the womb of an animal be a person or not? Would the answer to this question vary with respect to whom its rights were being asserted against? The biological parents, for instance? The owner of the horse or cow it was being gestated in?

We are not yet near the point of achieving this breakthrough, but the mere fact that it is discussed in the literature at this time does serve to illustrate the point that the *Roe* birth requirement for determining personhood is incapable of adapting to changes in medical technology even if it once did have some validity at all.

Even as recently as this past May, the month after the District Court entered judgment in this case, a report was published in the New England Journal of Medicine stating in detail the success of a surgical team which repaired a serious, and what probably would have been an ultimately fatal, developmental defect in a prenatal human of age 24 1/2 weeks gestation. The child's abdominal contents had entered the sac designed to hold one of its lungs.

The physicians first anesthetized both the mother and the patient. They then drained and preserved the amniotic fluid. The arm of the child was withdrawn from the womb to enable the team to monitor the child's heart rate and rhythm with an EKG, and to monitor the oxygen saturation of the blood.

44.) *See*, Note, *Artificial Gestation: New Meaning for the Right to Terminate Pregnancy*, 21 Ariz.L.Rev. 755 (1979), and D. Kraemer, *Intra- and Inter-Specific Embryo Transfer*, Journal of Experimental Zoology, Nov. 1983, vol 228, at 363.

45.) *See*, Note, 21 Ariz.L.Rev. at 758-759, *supra*.

After surgery the amniotic fluid was replaced and the child was delivered by cesarean section at age 32 weeks gestation (i.e. just over seven months of gestational age). The report concluded by noting that at eight months of postnatal age the baby is "...at home, growing, and developing normally." [46]

Oddly enough, if the surgery had been only partially successful, the child might have to have been delivered even earlier than it was for further corrective surgery, and it would then have had all of the rights of personhood at an earlier stage of its development. But in cases in such as this, where the surgery is not a failure, and the child remains in utero, it is then subject to the whim of its mother and the attending physician about decisions to abort it, experiment on it, or sell its various body parts or tissues for a longer period of time. This illustrates as well as any case the fact that the current *Roe* birth requirement for the recognition of prenatal natural personhood lends new meaning to the term "legal fiction."

What will be the case when neonatal surgical techniques improve even more? What will be the case when an artificial placenta is developed? Surgical teams will be able to remove a prenatal patient from the womb entirely, severe the umbilical cord, and perform difficult procedures which would have been impossible for the team in the above article to do.

During the time that such a child is not in the womb, will it be a person or not? And will this vary with respect to whose rights its claims are being asserted against? If, after surgery, it is then placed back in the womb with a reconstructed or artificial placenta, will it then become a nonperson once more?

The *Roe* birth requirement for personhood is unworkable enough as things stand now. In the future it can only serve to create an even greater monstrosity in logic and an un-

46.) Harrison, *et. al.*, *Successful Repair In Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax*, The New England Journal of Medicine, May 31, 1990, vol. 322, No. 22, 1582-1584.

workable basis for adjudicating the rights of all parties in the eyes of the law. The *Roe* birth requirement must be abandoned.[47]

b. Prenatal humans are entitled to a presumption of natural personhood.

The principle issue in *Dred Scott* was standing. This Court said that in order to have standing one not only had to show that one was a person, but also that one fell within an exlcusive class of persons who alone could also qualify as citizens. This Court even went so far as to say that the white race owed no obligation to uphold or protect the rights of slaves of African descent; but this was an incorrect statement of the law at that time even according to the law of the slave states themselves.[48]

The Fourteenth Amendment changed the requirement of standing from citizenship to personhood. But not only that, the determination as to who a person is was intended to be a simple one-tier analysis instead of the two-tier analysis of citizenship in *Dred Scott.* [49] The simple fact of personhood alone would establish the foundational, threshold basis for standing in any analysis of the issue of standing under the

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47.) For a contemporary comment on the need for a recognition of the personhood of prenatal human offspring, see, Hentoff, *Legal Status Could Guard Unborn From Neglect,* Human Events, Sept. 1, 1990 at 14.

48.) *State v. Jones,* 2 Miss. (1 Walker) 39 (1820).

49.) The sponsor of the Fourteenth Amendment in the U.S. House of Representatives, John A. Bingham, said that the amendment was "universal" and that it applied to "any human being." Cong. Globe, 39th Cong., 1st Sess. 1089 (1866). His counterpart in the Senate, Jacob Howard, said the amendment applies to "the humblest, the poorest, the most despised." Cong. Globe, 39th Cong., 1st Sess. 2766. And, as U.S. Senator Allen A. Thurman of Ohio would say a short time later, in 1875, the Equal Protection Clause, "...covers every human being within the jurisdiction of a State. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, every human being within the jurisdiction of a State from any deprivation of an equal protection of the laws." 3 Cong. Rec. 1794.

Fourteenth Amendment. This Court erred in *Roe* in failing to recognize this when it employed the *Dred Scott* analysis in determining prenatal personhood.

The Thirteenth and Fourteenth Amendments overruled the *result* of *Dred Scott*; but this Court has never overruled the *analysis* of *Dred Scott*. We ask this Court to do so now.

B. The Ethical Obligations Of The Legal Profession Will Prevent A State Attorney General From Ever Making The Arguments On Behalf Of Prenatal Natural Personhood Which We Make Here.

An attorney representing a state will always have an ethical obligation to his client, the state, to refrain from making the type of arguments in support of prenatal natural personhood which we make here. *Webster v. Reproductive Health Services* was a perfect example of this. The statute challenged therein defined personhood for all purposes as beginning at conception, subject only to the limitations placed on such status by this Court.

The most significant ethical barrier which appellant Webster faced, or which counsel for Texas and Georgia faced in *Roe* and the companion case *Doe v. Bolton,* [50] or which any future attorney general could face, is that a recognition of prenatal natural personhood within the meaning of the United States Constitution in one case can be used eventually against that attorney's client, the state, in a subsequent case. This was recognized by this Court in footnote 54 of its opinion in *Roe*. Thus, an attorney general will always be under an obligation to at least try to win a case without seeking a recognition of federal natural personhood. We submit that this ethical obligation alone would suffice to establish the inadequacy of the representation of prenatal humans by an attorney for a state.

Further, the defendants didn't even bother to show up for the last two of the three status hearings held by the District

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50.) 410 U.S. 179 (1973),

Court after *Webster*, despite the express statutory provision of Illinois law which makes prenatal humans persons in the State of Illinois if *Roe* is ever modified, and despite the fact that the District Court expressly stayed the proceedings in this case pending this Court's decision in *Webster v. Reproductive Health Services*, and further despite the fact that *Webster* expressly modified *Roe* in part. In the one hearing which they did attend they made no reference to the statutory provision which makes prenatal humans in the State of Illinois persons if *Roe* is ever modified, nor did they even mention that *Roe* had been modified.[51] (*See* Appendixes J, L, and N.)

C. The Rights Of Prenatal Humans In This Case Must Be Recognized.

Prenatal human offspring in the State of Illinois are nonjoined indispensable parties to this case. (*See,* note 27, *supra.*) Under *Provident Tradesmen's Bank and Trust Co. v. Patterson* and *Hoe v. Wilson*, this Court has recognized that appellate courts (including this Court itself) must act, sua sponte if need be, to protect the interests of nonjoined indispensable parties.[52]

VI. THIS CASE IS DISTINGUISHABLE FROM DIAMOND V. CHARLES.

We take no issue with this Court's holding in *Diamond v. Charles*, 476 U.S. 54 (1986). That case was properly decided. But this case is distinguishable from *Diamond* because Baby Scholberg sought to intervene to protect the private causes of action which one has in Illinois for a violation of a criminal statute. We do not seek to enforce either the criminal or civil actions which the State of Illinois itself could assert on its

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51.) *See, Weisman v. Darneille,* 89 F.R.D. 47 (D.C.N.Y. 1980) (decision of a party to discontinue status as a named plaintiff sufficed to establish that the proposed intervenor's interest was not adequately represented by that party).

52.) *Provident Tradesmen's Bank and Turst Co. v. Patterson,* 390 U.S. 102 (1968); *Hoe v. Wilson*, 76 U.S. (9 WALL.) 501 (1869).

own behalf under the statute, nor do we seek to force the State to do so itself.

The significance of this is that a right to maintain private causes of action under a criminal statute has a palpable and direct deterrent effect. This is a present, concrete benefit to be gained by prevailing in this Court on the merits.

A violation of a statute in Illinois may give rise to a private cause of action. There are two things which one must prove for this rule to apply. First, one must show that the injury suffered is the type of injury which the statute was designed to protect against.[53] Second, one must show that the person injured falls within the class of persons intended to be protected by the statute.[54] Indeed, everyone who is intended to be protected by the statute is entitled to damages for injuries caused by a violation of the statute.[55]

Dr. Diamond would not have been able to satisfy either requirement in any subsequent case if he had prevailed in this Court. Under virtually any subsequent violation of this statute, by contrast, prenatal humans in the State of Illinois would be able to satisfy both requirements. As to the type of injury, that much is obvious. As to the class of persons intended to be protected, Illinois provides by statute that prenatal humans are persons for purposes of state law.[56] They obviously are intended to be protected by the Fetal Experimentation Act. *See also* Section Two of ¶ 81-21, which states that the Illinois Abortion Act is intended to protect, *inter alia*, the rights and interests persons who participate in familial relations.[57]

We do not wish to be sold or experimented on. If a law had been passed prohibiting selling blacks or experimenting on

53.) *Ney v. Yellow Cab*, 2 Ill.2d 74, 117 N.E. 2d 74 (1954).

54.) *Brunnworth v. Kernes-Donnewald Coal Co.*, 260 Ill. 202, 216-17, 103 N.E. 178, 184 (1913). *Compare, Gibson, v. Leonard*, 143 Ill. 182, 32 N.E. 182 (1892).

55.) *Ross v. Shooley*, 257 F. 290 (1919); cert. den. 249 U.S. 615.

56.) *See* note 3, *supra*.

57.) Id.

Jews, and a federal court had struck down the law as being unconstitutional, would not blacks and Jews have a direct interest in the wrongful striking down of that statute? [58]

If the order of the District Court is allowed to stand it will be legal for someone who wishes to experiment on prenatal humans to insist that they be Jewish babies only, as the Nazis did at Auschwitz. If someone wants to be a broker for prenatal humans, their body parts, or their tissues, it will be legal for that person to insist that they be black babies only, as the slave owners did during the 1800's. If the order of the District Court is allowed to stand, racism, sexism, and every form of invidious discrimination which society has witnessed will be fair game for anyone who is willing to restrict his activities to those members of humanity who are the most helpless.

If there is anything else that distinguishes this case from Diamond and the other cases cited by the Seventh Circuit it is this: In Diamond and the other cases those who lacked standing were affected only by a state's attorney's decision not to prosecute under, or otherwise uphold and defend, a criminal law. Here, by contrast, we have been injured by a federal court's own unlawful action---striking down a statute which we would have private causes of action under even though the Court lacked subject matter or personal jurisdiction. In those other cases it was the governments' attorneys who had caused the alleged injury; here it is the federal court itself which has harmed us. In those other cases those who were denied standing had tried to use the federal courts to

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58.) *See, Larson v. Valente*, 456 U.S. 228 (1982) (Recognizing standing by a nonprofit organization to challenge a statute requiring the registration of certain religious organizations, even though the nonprofit organization might ultimately be found to be a nonreligious organization, and thus not governed by the statute.); *see also, Baker v. Carr*, 369 U.S. 186 (1962) (Interest in a fraction of a vote in a future election was sufficient to establish standing to challenge legislature apportionment.); *Data Processing Services v. Comp.*, 397 U.S. 150 (1970) (standing recognized for those who were arguably within the class of persons to be protected); *Barlow v. Collins*, 397 U.S. 159 (1970).

force a state to allow private citizens to take on the functions of a state; here, by contrast, we are not asking for something from the federal courts. We ask instead that an exercise of federal judicial power without subject matter jurisdiction be overruled so that we may enjoy the present deterrent effect of our own private causes of action. We seek no order requiring any State officer to do anything, nor do we wish to take upon ourselves any such functions and authority of the State.

Thus, though it is true that "the power to create and enforce a legal code, both civil and criminal, is one of the quintessential functions of a State"[59], yet it remains true simultaneously that a federal court must have jurisdiction to hear a challenge to the statute. And though a private citizen does not have the kind of direct stake in defending the standards embodied in a statute by which the State itself could impose criminal or civil sanctions *for the sake of the State's own interests,* yet where the State provides for a private cause of action under such a statute, a private citizen whose right to enjoy the protection of those causes of action has a direct stake in preventing an unlawful exercise of jurisdiction by a federal court which would keep the private citizen from enjoying the deterrent effect of the private causes of action. (*See* note 58, *supra.*)

The Seventh Circuit reasoned that the decision of the District Court must stand because the defendants, whom the Seventh Circuit deemed to be the only persons with standing, declined to challenge the District Court's order. But the Seventh Circuit seems to have forgotten one thing: Federal subject matter jurisdiction does not, can not, arise by consent; the mere fact that the parties whom the court does recognize have decided not to address a particular point of subject matter jurisdiction does not, by that mere act or failure of the parties themselves, confer jurisdiction on the court. With the case squarely before it, the Court of Appeals should have made an inquiry into the jurisdictional defects

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59). *Diamond*, 476 U.S. at 65.

raised in the submited memos; but the Court made no such inquiries. [60]

VII. THIS CASE WILL BE DISPOSED OF EASILY.

Once the issue of prenatal personhood is resolved, the facial void for vagueness challenge will be easy to rule on. The one clear conclusion which this court will face at the end of this case will be to remand it to the District Court with instructions to dismiss the case.

A. This Case Will Not Be Rendered Moot By The Birth Of Baby Scholberg.

The proposed intervenor, Andrew D. Scholberg, has sought not simply the protection of the specific person Baby Scholberg, but also prenatal humans to be conceived in the future in the State of Illinois; these would include any future prenatal offspring of his own. By the time *Roe v. Wade* reached this Court, Jane Roe (i.e. Norma McCorvey) had already given birth to her daughter. But this Court held that the possibility of future pregnancies kept the case alive, saying,

> "...Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' " [61]

Further, the Court can take a motion to dismiss for mootness under advisement until it determines whether prenatal humans are persons or not. If this Court deter-

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60.) *See, Bender, Page, Hahn, Emrich, In Re Martin-Trigona, In Re Miscott Corp., Minnesota Chippewa Tribe Red Lake Band, Figueroa-Rodriguez, U. S. v. State of Alabama, FTC v. Owens-Corning Fiberglas, Othman, and In Re Rini* (note 11, *supra.*) *See also, National Metalcrafters v. McNeil,* 103 F.R.D. 536 (D.C. Ill. 1984) (questions of jurisdictional defects may be raised by a party who intervenes.). *See also,* Dobbs, *The Decline of Jurisdiction by Consent,* 40 N.C.L.Rev. 49 (1961); and Moore, *Collateral Attack on Subject Matter Jurisdiction,* 66 Cornell L.Rev. 534 (1981)

61.) *Roe v. Wade,* 410 U.S. 113, 125 (1973).

mines that they are persons and also nonjoined indispensable parties, then under the Court's own doctrines of *Provident Tradesmen's Bank* and *Hoe v. Wilson* (*see*, note 52, *supra*) and under Federal Rule of Civil Procedure 19(b), the case will have to be dismissed for nonjoinder of indispensable parties, the prenatal humans in the State of Illinois. This is more procedurally sound than what happened in *Roe* itself.

A member of this Court recognized at the oral argument of *Roe* that the Court could take judicial notice of the fact that there are, at any given moment, pregnant unmarried women in the State of Texas, and counsel for Texas agreed with this.[62]

With respect to this case, then, the Court could take notice that there are at any given moment prenatal humans in the State of Illinois, and then determine whether they are nonjoined indispensable parties or not. We ask the Court to take such notice.

CONCLUSION

Wherefore, the petitioners respectfully ask this Court to grant the Petition for Certiorari.

Respectfully submitted,
Lawrence J. Joyce
Counsel of Record for the Petitioners.

62.) Tr. of Oral Arg. in *Roe v. Wade*, #70-18, at 31.

90-922

NO.

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1990

ANDREW D. SCHOLBERG, et. al.,

Petitioners

v.

AARON S. LIFCHEZ, et. al.,

Respondents

Petition Of Appellants/Proposed Intervenors For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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APPENDIX TO CERTIORARI PETITION

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INDEX TO APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUDGMENT - WITHOUT ORAL ARGUMENT

September 10, 1990

No. 90-2208 - Judge Ann Claire Williams

BEFORE:
Honorable John L. Coffey, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge

AARON LIFCHEZ, individually and on behalf of all others similarly situated, Plaintiff - Appellee

NEIL F. HARTIGAN and RICHARD M. DALEY,
Defendants

and

ANDREW D. SCHOLBERG, as Expectant Father and Next Friend of BABY SCHOLBERG, who fairly and adequately represents the class of unborn babies of the State of Illinois, presently conceived or to be conceived in the future,
Proposed Intervenor - Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came before the Court for decision on the record from the above mentioned district court.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

APPENDIX B

IN THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted August 14, 1990
Decided September 10, 1990.

No. 82 C 4324 - Judge Ann Claire Williams

Before
Hon. JOHN L. COFFEY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge

AARON LIFCHEZ, *et al .*,

Plaintiffs

No. 90-2208 v

NEIL F. HARTIGAN and CECIL PARTEE,

Defendants

UNPUBLISHED OPINION AND ORDER

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

The district judge enjoined the operation of Ill. Rev. Stat. ch. 38 ¶81-26 §6 (7) on the ground that it is unconstitutionally vague. Neil F. Hartigan, the Attorney General of Illinois, and Cecil Partee, the State's Attorney of Cook County, the defendants, decided not to take an appeal. Four days before the expiration of the period within which to appeal, Andrew D. Scholberg attempted to intervene for the purpose of taking an appeal. The district judge denied the petition for intervention, and Scholberg has appealed.

The original plaintiffs ask us to dismiss the appeal on the ground that Scholberg lacks standing. Although this is one of the two grounds on which the district judge denied the motion to intervene (the other is that Scholberg could not establish that the Attorney General and State's Attorney are inadequate representatives of the state's interests), it is not an obstacle to appellate jurisdiction. *Whether* Scholberg is a proper party is a subject that he is entitled to litigate. If he is not, the appropriate disposition is an order affirming the decision refusing to allow Scholberg to intervene.

Although the plaintiffs do not expressly ask for summary affirmance, their motion and Scholberg's response present all of the arguments necessary to decision on that question, and it is appropriate to stop this case short of full briefs. As *Diamond v. Charles,* 476 U.S. 54 (1986), a closely analogous case, holds, the defense of Illinois statutes is entrusted to the State's Attorneys and Attorney General of Illinois. Citizens of Illinois disappointed by public officials' litigation decisions have their say at the ballot box; they may not act as if *they* were the Attorney General or State's Attorney.

The district judge was correct to hold that Scholberg lacks standing, whether in his own name or as next friend of his unborn child. Scholberg is not a subject of this law. His interest, such as it is, lies in inducing the Attorney General and State's Attorney to bring prosecutions to enforce the law. For many years it has been understood that private citizens lack standing to compel enforcement of the criminal law. *Linda R.S. v. Richard D.,* 410 U.S. 614 (1973); *Leeke* v. *Timmerman,* 454 U.S. 83 (1981); *Allen v. Wright,* 468 U.S. 737 (1984).

Affirmed

APPENDIX C

(Entered July 19, 1990)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, IL 60604

AARON LIFCHEZ, etc.,

Plaintiff-Appellee,

v.

NEIL F. HARTIGAN & RICHARD M. DALEY

Defendants,

and

ANDREW D. SCHOLBERG, etc.,

Proposed Intervenor-Appellant.

No. 82 C 4324 - Judge Ann Claire Williams

REQUEST OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOR JURISDICTIONAL MEMO

Appellant filed a notice of appeal on May 29, 1990 from the district court's final order entered on April 27, 1990 and from the district court's order entered May 29. 1990 denying appellant leave to intervene. The appeal from the district court's April 27, 1990 order appears to be untimely, however, because the notice was filed in the district court 31 days after entry of final judgment, one date late. See Federal Rule of Appellate Procedure 4(a) (1); *Romasanta v. United airlines, Inc.*, 537 F.2d 915, 919 (7th Cir. 1976), aff'd sub nom *United Airlines, Inc., v. McDonald*, 432 U.S. 385 (1977).

See generally 9 Moore's Federal Practice Sec. 203.06 at p. 3-20 (2d ed. 1990). Accordingly, appellant is directed to file a memorandum discussing why this appeal should not be dismissed as to the April 27, 1990 order. This statement shall be filed on or before July 30, 1990. Briefing in this appeal will continue to be held in abeyance pending resolution of jurisdictional issues. A motion to dismiss the appeal from that order pursuant to Rule 42(b) will satisfy this requirement.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 82 C 4324 - Judge Ann Claire Williams

AARON LIFCHEZ, et al.,

Plaintiffs

v.

NEIL F. HARTIGAN & RICHARD M. DALEY,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that ANDREW D. SCHOLBERG, the proposed intervenor, as Expectant Father and Next Friend of BABY SCHOLBERG, who fairly and adequately represents the class of unborn babies of the State of Illinois, presently conceived or to be conceived in the future, hereby appeals both on behalf of BABY SCHOLBERG and on behalf of the class of the unborn babies of the State of Illinois, presently conceived or to be conceived in the future, to the United States Court of Appeals for the Seventh Circuit from the MEMORANDUM OPINION AND ORDER dated and entered in this action on the 26th day of April, 1990, and the MINUTE ORDER dated and entered in this action on the 24th day of May, 1990.

Respectfully submitted,

Lawrence J. Joyce

APPENDIX E

September 24, 1990

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 82 C 4324

AARON LIFCHEZ, et. al.,

Plaintiff

v.

NEIL HARTIGAN, et. al.,

Respondant

Petition to intervene to maintain class action and to file notice of appeal is denied for the reasons stated in open court.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

AARON LIFCHEZ, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 82 C 4324
	)	
NEIL F. HARTIGAN and	)	Chicago, Illinois
RICHARD M. DALEY,	)	May 24, 1990
	)	9:30 a.m.
Defendants	)	Motion

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE ANN C. WILLIAMS

APPEARANCES

For the Plaintiff:	MR. HARVEY M. GROSSMAN, Legal Director, Roger Baldwin Foundation of ACLU 20 East Jackson Boulevard, Suite 1600 Chicago, Illinois 60604
For Neil F. Hartigan:	MS. KATHLEEN K. FLAHAVEN, Assistant Attorney General 100 West Randolph Street, 13th Floor Chicago, Illinois 60601
For Richard M. Daley	MR. HAROLD E. McKEE III, Assistant States Attorney 500 Daley Center Chicago, Illinois 60602
Petitioner:	MR. LAWRENCE J. JOYCE 6203 North Keeler Avenue

Chicago, Illinois 60646
Court Reporter: Valarie M. Harris
Official Court Reporter
219 South Dearborn Street, Room 1928
Chicago, Illinois 60604
(312) 435-6891

THE CLERK: 82 C 4324 Lifchez versus Hartigan on a motion.

MS. FLAHAVEN: Good morning, Your Honor. Kathleen Flahaven, assistant attorney general, on behalf of Attorney General Hartigan.

MR. JOYCE: Good morning, Your Honor. Larry Joyce on behalf of the movant Baby Scholberg as represented by Andrew Scholberg.

MR. GROSSMAN: Good morning, Your Honor. Harvey Grossman on behalf of the plaintiffs. If I might approach the bench, Your Honor, I'd like to file a motion for leave to appear. Miss Connell, who has represented the plaintiff from my office, is on a parental leave.

THE COURT: All right. I'm prepared to rule on the motion to intervene, but I have a long call, so I'm going to call this at the end of the call and I'll rule.

MR. GROSSMAN: Thank you.

THE COURT: All right.

(Whereupon, other cases were called and heard.)

THE CLERK: 82 C 4324, Lifchez versus Hartigan on motion, recall.

MR. JOYCE: Larry Joyce representing Baby Scholberg as represented by Andrew Scholberg.

MR. GROSSMAN: Harvey Grossman on behalf of the plaintiffs, Your Honor.

MS. FLAHAVEN: Kathleen Flahaven, assistant attorney general, on behalf of Attorney General Hartigan.

MR. MC KEE: Harold McKee, assistant state's attorney, on behalf of State's Attorney Partee.

THE COURT: All right. With respect to the motion to intervene, that motion is denied. Federal Rule of Civil Procedure 24, which allows for intervention, was not designed to allow everyone who has a theoretical beef with a court order to intrude in the action. While it is true that Courts will occasionally allow intervention even after judgment for purposes of taking an appeal, the proposed intervenor must have standing. He must have some interest which would be impaired if intervention is denied. The proposed intervenor here has not such interest. He has not alleged that he is about to be experimented upon, which was the provision in the statute at issue in the Court's April 26th opinion. The proposed intervenor's only interest heard, as far as I can discern from the brief, is to complain about this Court's opinion on the irrelevant ground of Section 1 of the Illinois abortion law and state cases on the tort of wrongful birth. If the proposed intervenor had taken the trouble to read the opinion of April 26th and to read it carefully, he would have realized that the statutory provision being challenged was Section 6, subsection 7, not Section 1. The Attorney General and the state's attorney adequately represented the interests of the state in enforcing the statute. The proposed intervenor has no interest here, and the motion to intervene is therefore denied.

MR. JOYCE: May I address the Court concerning the issues?

THE COURT: Well, you've made your position clear int he brief. I have ruled. You can have about a minute because I have to proceed on other matters.

MR JOYCE: We just wish to state for the record that we raise an issue of nonjoinder of indispensible parties, the prenatal humans. The statute is not vague. The burden of showing the adequacy of representation under Federal Rule 24 is not on the party seeking to intervene, and the authority in the Seventh Circuit must be reexamined in light of the Supreme Court's decision in Martin v. Wilkes. We allege that the opinion in Roe versus Wade and of this Court inadvertently effectively overruled the 5th, 13th and 14th Amendments. We also wish to challenge the subject matter jurisdiciton of the Court. Roe versus Wade and the opinion of this Court, with due regard to the sensitivities of this Court, inadvertently overruled the Dred Scott decision to the extent that it would allow a person to have rights under state law.

THE COURT: Certainly you've made your record. I think it's a very bizarre reading of the Court's opinion. All I did was hold that the experimental statue was vague and it was difficult for doctors to discern what type of treatment or experimentation could be done on a pregnant mother and the effect it might have on the fetus. It doesn't even bring into question any of the statues that you raise. Nor does it really even comment on the validity of the abortiuon statute or not. It doesn't have anyting to do with that. At any rate, I've ruled. Motion to intervene is denied.

MR. GROSSMAN: Your Honor, for the record might I add just two or three things --

THE COURT: Yes.

MR. GROSSMAN: -- in response to these comments? The petitioner, the movant did not comply with Rule 24. There is no pleading attached to his motion. We could not have responded to these papers as they presently stood because of that deficiency. While he sought to purport to represent the class in this case, he never complied with Rule 24. There is no allegations

defining the class and meeting the requirements of Rule 23B. In addition to that, two decisions that have already been decided here in the circuit would preclude his participation, Diamond versus Charles in the United States Supreme Court and Keith versus Daley in the Seventh Circuit. And we would like to bring those to the Court's attention.

THE COURT: All right. Thank you, counsel.

MS. FLAHAVEN: Thank you, Your Honor.

APPENDIX G

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

No: 82 C 4324

AARON LIFCHEZ, et al.,

v.

NEIL F. HARTIGAN
RICHARD M. DALEY,

XX Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and A decision has been rendered.

IT IS ORDERED AND ADJUDGED

that summary judgment is entered in favor of the plaintiff class of physicians represented by DR. AARON LIFCHEZ and against defendants NEIL F. HARTIGAN and RICHARD M. DALEY; that Section 6(7) of the Illinois Abortion Law is unconstitutional and the defendants are permanently enjoined from enforcing it.

APRIL 26, 1990 — *Date*

H. STUART CUNNINGHAM — *Clerk*

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 82 C 4324 - Judge Ann Claire Williams

AARON LIFCHEZ, et al.,

Plaintiffs,

v.

NEIL F. HARTIGAN and RICHARD M. DALEY,

Defendants.

MEMORANDUM OPINION AND ORDER

Dr. Lifchez represents a class of plaintiff physicians who specialize in reproductive endocrinology and fertility counselling. Physicians with these medical specialties treat infertile couples who wish to conceive a child. Dr. Lifchez is suing the Illinois Attorney General and the Cook County State's Attorney, seeking a declaratory judgment that a provision of the Illinois Abortion Law is unconstitutional. He also seeks a permanent injunction against the defendants from enforcing the statute. The provision at issue concerns fetal experimentation. Ill.Rev.Stat., Ch. 38 ¶ 81-26, § 6(7) (1989). Both sides move for summary judgment, alleging that there are no disputed facts and that each side is entitled to judgment as a matter of law. The court finds that § 6(7) of the Illinois Abortion Law violates the Constitution in two ways: (1) it offends Fourteenth Amendment principles of due process by being so vague that persons such as Dr. Lifchez

cannot know whether or not their medical practice may run afoul of the statute's criminal sanctions, and (2) the statute impinges upon a woman's right of privacy and reproductive freedom as established in Roe v. Wade, 410 U.S. 113 (1973), Carey v. Population Services International, 431 U.S. 678 (1977), and their progeny. The court therefore declares § 6(7) of the Illinois Abortion Law to be unconstitutional and permanently enjoins the defendants from enforcing it.

VAGUENESS [1]

Section 6(7) of the Illinois Abortion Law provides as follows:

> (7) No person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced. Intentional violation of this section is a Class A misdemeanor. Nothing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.

Ill.Rev.Stat., Ch. 38 ¶ 81-26, § 6(7) (1989). Dr. Lifchez claims that the Illinois legislature's failure to define the

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1.) Defendant Hartigan makes a belated abstention argument in his Response Brief in Opposition to Plaintiff's Motion for Summary Judgment at 11. As Dr. Lifchez points out, this is a curious litigation strategy for a party who has himself moved for summary judgment on the exact same issues presented by Dr. Lifchez' motion. The court declines to abstain. Abstention is appropriate "where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" Bellotti v. Baird, 428 U.S. 132, 147 (1976). The costs of abstention in terms of delay and expense are often substantial. Kusper v. Pontikes, 414 U.S. 51, 54-55 (1973). Those costs are not justified when the challenged statute cannot reasonably be construed to avoid interfering with a woman's reproductive privacy rights under Roe v. Wade and Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 441-42 (1983). The costs of abstention are even less justified when the challenged statute is so vague that it violates Fourteenth Amendment due process. Colautti v. Franklin, 439 U.S. 379, 392 n.9 (1979).

terms "experimentation" and "therapeutic" renders the statute vague, thus violating his due process rights under the Fourteenth Amendment. The court agrees.

Vague laws - especially criminal laws - violate due process in three ways. First, they fail to give adequate notice of precisely what conduct is being prohibited. Without such notice, it is impossible for people to regulate their conduct within legal bounds. Smith v. Goguen, 415 U.S. 566, 572 n.8 (1974) (statute holding criminally liable anyone who "treats contemptuously" the United States flag held to be unconstitutionally vague, citing Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939): "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.") See also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning.") The second problem with vague statutes is that, by failing to explicitly define what conduct is unlawful, they invite arbitrary and discriminatory enforcement by the police, judges, and juries. Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (Court held unconstitutionally vague a vagrancy statute outlawing "'rogues. . . vagabonds. . . common night walkers. . . persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers..."). See also Smith v. Goguen, 415 U.S. at 575 (commenting on the lack of a clear standard in phrase "treats contemptuously" for flag statute, Court said "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.")

Last, vague standards of unlawful conduct, coupled with the prospect of arbitrary enforcement, will inevitably cause people to "steer far wider of the unlawful zone. . . than if the boundaries of the forbidden areas were clearly marked." Grayned v. Rockford, 408 U.S. at 109. This is an especially dangerous consequence of vague statutes that encroach

upon constitutional rights. Colautti v. Franklin, 439 U.S. 379, 391 (1979) (held unconstitutionally vague an abortion law requiring persons performing abortions to preserve life of fetus if it could be determined that the fetus 'is viable or if there is sufficient reason to believe that the fetus may be viable..."). See also Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982) (although upholding drug paraphernalia ordinance against a vagueness attack, Court warned that perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); Smith v. Goguen, 415 U.S. at 573 ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.") It is a fundamental principle of due process that persons "'of common intelligence" not be forced to guess at the meaning of the criminal law.'" Id. at 574.

A. Experiment or Routine Test?

The Illinois legislature's failure to define "experimentation" and "therapeutic" in § 6(7) means that persons of common intelligence will be forced to guess at whether or not their conduct is unlawful. As Dr. Lifchez points out in his briefs, there is no single accepted definition of "experimentation" in the scientific and medical communities. Dr. Lifchez identifies four referents for the term. One meaning of experiment is pure research, where there is no direct benefit to the subject being experimented on, and the only goal of the research is to increase the researcher's knowledge. Plaintiff's Brief in Support of Summary Judgment at 7. This definition describes the defendants' "Orwellian nightmare" of laying out fetuses in a laboratory and exposing them to various harmful agents "just for the scientific thrill" of it. Defendant Hartigan's Reply Brief in Support of Summary Judgment at 3. A second meaning of experiment includes any procedure that has not yet been sufficiently tested so that the outcome

is predictable, or a procedure that departs from present-day practice. This is the kind of definition adhered to by insurance companies, which often deny coverage for procedures whose effectiveness is not generally recognized. Plaintiff's Brief in Support of Summary Judgment at 8. Dr. Lifchez also cites to the definition of experiment by the American Fertility Society, which includes as "experimental"- even standard techniques when those techniques are performed by a practitioner or clinic for the first time. Id. at 8-9. Finally, any medical therapy where the practitioner applies what he learns from one patient to another, could be described as an "experiment." Id. at 9. See, e.g., Margaret S. v. Edwards, 794 F.2d 994, 999 (5th Cir. 1986) (medical treatment can be described as both a test and an experiment "whenever the results of the treatment are observed, recorded, and introduced into the data base that one or more physicians use in seeking better therapeutic methods.) This definition of experiment is in line with that apparently contemplated by the federal regulations on protection of human research subjects: "'Research' means a systematic investigation designed to develop or contribute to generalizable knowledge." 45 C.F.R. § 46.102(e) (1989)

The legislative history of § 6(7) is unenlightening as far as nailing down a particularized meaning of "experiment" to counter the vagueness that Dr. Lifchez claims is inherent in the statutory language. The bill's sponsor, Representative O'Connell, responded as follows to the governor's veto of the bill (due to what the governor saw as unconstitutional vagueness in the word "experimentation"): "I would submit that the word experiment is quite clear and does not have a vague connotation to it. In fact, the American Heritage dictionary is quite clear in defining experiments as a test made to demonstrate a known truth; to examine the validity of a hypothesis or to determine the efficacy of something previously untried." Plaintiff's Response to Motion for Summary Judgment, Exhibit A, State of Illinois 84th General Assembly, House of Representatives Debate, October 30, 1985 (Exhibit A), p.74. It is hard to imagine two more opposed definitions of "experiment" than, on the one hand,

"a test made to demonstrate a known truth," and, on the other hand, a test to determine the efficacy of something previously untried." That the bill's sponsor could offer such wildly different definitions of "experiment" as if they both meant the same thing offers little help to persons of common intelligence who want to know what the state forbids.[2] Smith v. Goguen, 415 U.S. at 574; Lanzetta v. New Jersey, 306 U.S. at 453.

It is difficult to know where along this broad spectrum of possible meanings for "experiment" to fit the medical procedures performed by Dr. Lifchez and his colleagues. These procedures can be roughly divided into three kinds: diagnostic, in vitro fertilization and related technologies, and procedures performed exclusively for the benefit of the pregnant woman. The statute's vagueness affects all three kinds of procedures, but in different ways.

DIAGNOSTIC PROCEDURES

One of the more common procedures performed by reproductive endocrinologists is amniocentesis. Amniocentesis involves withdrawing a portion of the amniotic fluid in order to test it for genetic anomalies. It is performed on women considered to be at risk for bearing children with serious defects. Plaintiff's Brief in Support of Summary Judgment at 15 n.16. The purpose of the procedure is to provide information about the developing fetus; this information is often used by women in deciding whether or not to have an abortion. Although now routinely performed, amniocentesis could be considered experimental under at least two of Dr. Lifchez' definitions: it could be classified as pure research,

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2.) Defendant Daley claims that "experiment" and "therapeutic" have common definitions which, for some reason he does not explain, keep S 6(7) from being too vague. Defendant Daley's Brief in Support of Summary Judgment at 3. But the problem of vagueness here derives not so much from lack of a common definition of "experiment" as from the fact that there are several "common definitions," some of which oppose each other. A "test" to demonstrate something already known and a "test" to determine something as yet untried are very different kinds of tests. Vagueness can arise as much from coupling a concept with its antithesis as from a single, imprecise definition.

since there is no benefit to the fetus, the subject being experimented" on; it could also be experimental (as defined by the American Fertility Society) if the particular practitioner or clinic were doing it for the first time.

Amniocentesis illustrates well the problem of deciding at what point a procedure graduates from "experimental" to routine. Does this occur the fifth time a procedure is performed? The fiftieth? The five hundredth? The five thousandth? Shortly before the Illinois Abortion Law was first passed in 1975, amniocentesis was considered an experimental procedure by most definitions of the term. Plaintiff's Brief in Support of Summary Judgment at 16 n.16. See *National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Research on the Fetus*; Appendix, "An Assessment of the Role of Research Involving Living Human Fetuses in Advances in Medical Science and Technology" at 15-25 through 15-45. And yet ten years later, the legislature engaged in the following colloquy:

> Didrickson: Okay then, according to this information sheet that I have in front of me, what may be affected in addition to that rubella vaccination on the aborted fetus situation would be the 'corrian' biopsy which replaces potentially amniocentesis in the future?
>
> O'Connell: This is in no way to affect amniocentesis or that process.
>
> Didrickson: So, that's a third category it would not affect?
>
> O'Connell: Well, that presupposes that amniocentesis is an experimentation on a fetus.
>
> Didrickson: And you are saying that amniocentesis in, in vitro fertilization... preservation would not be affected by your Bill?
>
> O'Connell: That's correct.

Exhibit A, p. 120. Although the non-experimental status of amniocentesis in 1985 may be established through this

reference to legislative intent, the above dialogue underscores the problem of refusing to define the key terms in § 6(7) in the context of the rapidly growing field of reproductive endocrinology. Dr. Lifchez can hardly be expected to know which of his medical activities would be illegal now if he were to look back on the quick evolution of amniocentesis from (very likely) illegal experiment in 1975 to explicitly endorsed "process" in 1985. Statutory language that embraces both of these possibilities simply "has no core" of meaning and forces people of common intelligence to guess at what the law forbids. Smith v. Goguen, 415 U.S. at 574, 578. For this reason, it is unconstitutionally vague

The court is keenly aware that, because of the meteoric growth in reproductive endocrinology, any classification of a particular procedure as either "experimental" or "routine" could easily be out-of-date within six months. The same can be said for any statistics which might support a particular classification they could be downright quaint upon publication of the next study. The court's rationale does not depend on an accurate scientific classification of amniocentesis or any other technique. If amniocentesis is no longer "experimental," then some variation of it (or some other procedure) will be. Whether or not any particular procedure is experimental or routine is not as important as the fact that many procedures begin as the former and become the latter. It is this *process* that counts, not the classification at any particular point in time.

For this reason, the court has not ventured very far from the parties' briefs, but has relied instead on their undisputed descriptions of different procedures and also on the medical authorities that are cited in support of those descriptions. That the technology in the field may outstrip the parties' briefs - and this court's opinion - does not change the fundamental progression from "experiment" to "routine" in much scientific endeavor. It also does not relieve lawmakers of the responsibility for recognizing the inevitability of this progression, and particularly describing those actions that are unlawful. Failure to do so results in the anomalous situation of amniocentesis. The very same procedure that is

explicitly endorsed today would have been illegal ten years earlier - the illegality resulting from a legislative insistence on using a protean term such as "experiment." A statute is unconstitutionally vague if the mere passage of time can transform conduct from being unlawful to lawful.

The development of chorionic villi sampling further illustrates this problem. Chorionic villi sampling involves inserting a catheter through the cervix in order to take a biopsy of the chorionic tissue, tissue surrounding the fetus. As with amniocentesis, it is a diagnostic procedure designed to give information about the developing fetus; this information is often used by a pregnant woman in deciding whether or not to have an abortion. Chorionic villi sampling differs from amniocentesis in that it yields different genetic information, it can be performed earlier in the pregnancy, and, at least at present, it is riskier to the fetus. There is also little dispute that it is experimental. Plaintiff's Brief in Support of Summary Judgment at 16. Considering all this, and especially given that chorionic villi sampling would only rarely be therapeutic to the fetus (if, for example it led to in utero surgery), it is surprising to see Representative O'Connell, in the passage quoted above, apparently exempting this procedure from the reach of § 6(7): "Didrickson: . . . according to this information sheet. . . what may be affected would be the 'corrian' biopsy which replaces potentially amniocentesis in the future? O'Connell: This is in no way to affect amniocenteses or that process." This response is both surprising and confusing, since the language of the statute, as well as either of Representative O'Connell's own definitions of experiment ("to examine the validity of a hypothesis or to determine the efficacy of something previously untried") can quite easily include chorionic villi sampling, at least at its present stage of development. Once again, even if he were to study the statute and read the legislative debates, Dr. Lifchez could not know with any certainty what conduct is being forbidden.

In Vitro Fertilization and Related Technologies

Many other procedures that Dr. Lifchez performs on his patients could fall within the ambit of § 6(7) 6(7). Among

these are in vitro fertilization and the many techniques spawned through research into in vitro fertilization. The difficulty posed by these procedures is not just whether or not they are "experimental" but whether they are "therapeutic to the fetus." The statute's failure to define this phrase contributes to its vagueness. In vitro fertilization itself involves removal of a mature ovum, placing it in a petri dish or test tube (in glass, that is, in vitro), fertilizing it, and returning the embryo to the woman's uterus where it matures into a fetus. In vitro fertilization itself is explicitly permitted by the statute. Related reproductive technologies are less certain. Embryo transfer, for example, involves removal of an embryo from one woman's uterus and placing it in the uterus of a second woman. The variations on this basic technique are considerable. A donated egg could be fertilized in vitro (with a partner's or a donor's sperm), be placed in a second woman's uterus to gestate for five days, and then be flushed out for implantation in the woman trying to get pregnant. Lori B. Andrews, Medical Genetics: A Legal Frontier at 89-90 (American Bar Foundation 1987) That this procedure is experimental is undisputed. Whether it is "therapeutic to the fetus" (actually, embryo, but legislators and courts commonly - and incorrectly - elide the two) is more complicated. Certainly, it can be argued that it is not therapeutic. Removing an embryo from one woman's uterus, where it is gestating, for implantation in another woman, may be therapeutic for the woman trying to get pregnant, but it is not necessarily therapeutic for that embryo.

Perhaps this particular technique is protected by § 6(7)'s exception for in vitro fertilization. ("Nothing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.") But consider a slight variation on the procedure, where sterilization occurs in vivo, that is, in the uterus of the second woman. See Andrews, Medical Genetics at 163. There is ample evidence in the legislative debates that the legislature did not intend to prohibit technologies that might result in the birth of healthy children: "The in vitro fertilization process will improve but it will still remain in vitro fertilization and it is not this intent . . . the intent of this Bill

to, in any way, diminish that very valuable medical wonder ... We're not trying to, in any way, jeopardize the legitimate purposes of in vitro fertilization or amniocentesis or anything designed to enhance the birth of children by parents who otherwise could not have had those children." Exhibit A, pp. 83, 123. However, in vivo fertilization is not the same as in vitro fertilization, and the legislature chose to exempt only the latter from its ban on experimental procedures on the embryo.

It is of course a long-established rule of statutory construction that "the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." Matter of Cash Currency Exchange, Inc., 762 F.2d 542, 552 (7th Cir. 1985). This is part of the answer to Defendant Hartigan's claim that by not defining the key terms in § 6(7), the legislature allowed for "flexibility" in a growing field, rather than having a laundry list of exceptions that would be bound to omit something. The rest of the answer to this claim is that "flexibility" is always the defense for a statutory scheme that permits arbitrary and discriminatory enforcement of the law. Papachristou v. City of Jacksonville, 405 U.S. at 170-71. This does not change the principle that "statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." Smith v. Goguen, 415 U.S. at 575. Since in vivo fertilization and other non-in vitro variations on embryo transfer are not explicitly exempted by § 6(7), they are subject to the same objection mentioned above: they are therapeutic for the woman trying to get pregnant and unnecessarily risky for the developing embryo.

Other procedures give rise to this and similar objections. In genetic screening of in vitro embryos, one cell of an eight-cell embryo is removed for testing, while the rest are frozen. If the genetic screening on the single cell is negative, the remaining seven cells can be gestated to produce a child. Andrews, Medical Genetics at 87. This experimental proce-

dure is undisputably non-therapeutic to the embryo, and although it could fall within the statute's in vitro exception, that exception speaks to fertilization, not genetic testing. A failed implantation following in vitro fertilization genetic screening could subject Dr. Lifchez to criminal liability.

Two other in vitro fertilization-related procedures have a similarly uncertain status. Super-ovulation involves administering various hormones to induce ovulation, resulting in multiple ova. However, the hormones that are used for superovulation may have two negative effects on a woman's ability to get pregnant: lower-quality ova are produced and the uterus becomes less receptive to the embryo being implanted. In order to improve the chances of super-ovulation resulting in a pregnancy, Dr. Lifchez may need to experiment with particular elements in the procedure to achieve a more receptive uterine lining or better quality embryos. Plaintiff's Brief in Support of Summary Judgment at 25-27. Not all such attempts will be successful, and any particular one might not be therapeutic to the embryos, thus violating § 6(7).

A similar problem faces Dr. Lifchez even in performing in vitro fertilization itself. While the statute permits "the performance of in vitro fertilization," experiments designed to improve that technique have a far less certain status. Dr. Lifchez identifies two elements of in vitro fertilization that might profitably be varied in order to improve the rate of success: the shape of the vessel in which in vitro fertilization occurs, and the growth media in which the ova are fertilized. Trying different combinations of these two elements are bound to result in some failures, and hence not be therapeutic to those particular embryos. While defendants argue that it is obvious that an attempt to improve in vitro fertilization is protected, even if that attempt fails, this is apparently not the understanding of the bill's sponsor:

> Greiman: Mr. O'Connell, the Bill, I understand as it. . as it was amended, says that it is not intended to prohibit in vitro research. Is that correct? Not intended to prohibit in vitro research.

O'Connell: That Amendment was in the Senate, yes.

Greiman: It's not intended to. Now, does that mean that it might as it's drawn?

O'Connell: No, it shouldn't. It does not. We're trying to make the legislative intent in the language of the legislation to be as clear as possible that it shall not prohibit in vitro fertilization.

Greiman: So, that research on in vitro fertilization and techniques of in vitro fertilization techniques.

O'Connell: I didn't say research or techniques. In vitro. . .

Greiman: Well, what does it mean then, if it means anything?

O'Connell: The actual in vitro fertilization is not prohibited under this measure.

Exhibit A, pp. 117-118 (emphasis added). In this equivocal exchange, the bill's sponsor says first that further research is permitted ("Greiman: . . . it is not intended to prohibit in vitro research. Is that correct? O'Connell: . . . Yes."), but then changes, implying that only in vitro fertilization as it is presently performed is permitted ("Greiman: So, that research on in vitro fertilization and techniques of in vitro fertilization . . . O'Connell: I didn't say research or techniques . . . The actual in vitro fertilization is not prohibited under this measure.") The only certainty that Dr. Lifchez could take from this evidence of legislative intent is that he can attempt to improve "the actual in vitro fertilization" at his peril.

Procedures for the Pregnant Woman

A third class of procedures that Dr. Lifchez performs for his patients are those that are exclusively for the benefit of the pregnant woman. In order to discover correal carcinoma, for example, Dr. Lifchez would need to take a sample of fetal tissue for testing. Correal carcinoma originates with the

fetus and is capable of killing pregnant women. Any experimental therapy designed to detect or treat this condition is necessarily a non-therapeutic experiment upon the fetus. See Margaret S. v. Edwards, 794 F.2d 994, 999 n.12 (5th Cir. 1986); Plaintiff's Brief in Support of Summary Judgment at 11-13; Frederikson Affidavit ¶7.

Additional problems could arise with any therapy designed to help a pregnant woman. "With rare exception, any drug that exerts a systemic effect in the mother will cross the placenta to reach the embryo and fetus." Jack A. Pritchard, et al., Williams Obstetrics at 260 (17th ed. 1985). See also The Merck Manual at 1752-55 (15th ed. 1987). Thus, treatment for virtually any maternal complaint, whether it be high blood pressure, diabetes, epilepsy, or headaches, has the potential to affect the fetus. Even the use of aspirin and acetaminophen has an unknown, and potentially harmful, impact on fetal development. Quite naturally, a physician will want to know as much as possible about the effects of medication to both the pregnant woman, whose condition he is treating, and to her fetus. Such knowledge is often shrouded in uncertainty:

> The effects on the offspring cannot be predicted accurately either from the effects of lack of effects on the mother or from the effects or lack of effects on the offspring of animal species. Widespread use of a medication during pregnancy without recognized adverse effects on the fetus does not guarantee the safety of the medication. Only after many years of use was it established that diphenylhydantoin (Dilantin) and phenobarbital given to women to control epilepsy may both induce fetal malformation and impair synthesis by the fetus and newborn infant of the vitamin K-dependent coagulation factors II, VII, IX, and X. Not until deliberate, careful, extensive monitoring has failed to identify any adverse effects on the offspring not only in utero or childhood but also in the mature adult, can a drug really be declared to be safe for use in pregnancy. An especially pertinent example of delayed recognition

> of adverse effects by a drug that was widely used in obstetrics for a number of years is the induction of several abnormalities of the reproductive organs, including vaginal cancer, in young women whose mothers ingested diethylstilbestrol during pregnancy.

Williams Obstetrics at 260.

What happens when a physician wishes to try a new therapy on his pregnant patient which may have an unknown effect upon the fetus? What happens when he is virtually certain of a deleterious effect upon the fetus? See, e.g., Frederikson Affidavit ¶ 7; Merck Manual at 1752-53. Such a procedure could certainly be classified as "experimental" as to the fetus. And to the extent the physician chooses to treat primarily, or exclusively, his pregnant patient, it is doubtful that such treatment could be called "therapeutic to the fetus." By not adequately defining the terms "experiment" and "therapeutic", § 6(7) not only makes it difficult to know what conduct is forbidden, it also creates a situation where the pregnant woman and her fetus are in competition for the physician's therapy. [3]

Margaret S. Cases

The defendants point to Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980) (Margaret S. I), to support their claim that the Illinois statute's failure to define "experimentation" does not render § 6(7) unconstitutionally vague. The Louisiana statute at issue in Margaret S. I provided: "No person shall experiment upon or sell a live child or unborn child unless such experimentation is therapeutic to the child

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3.) Competition between the pregnant woman and her fetus has become an important focus of state statutes regulating abortion and of Supreme Court cases striking down such statutes. See, e.g., Thornburgh v. American College of Obstetricians, 476 U.S. 747, 768-71 (1986); Colautti v. Franklin, 439 U.S. 379, 397-401 (1979). Recently, this competition has surfaced in the context of fetal protection laws in the workplace. See, e.g., International Union v. Johnson Controls, 886 F.2d 871, 908-921 (7th Cir. 1989) (en banc) (Easterbrook, J., dissenting), cert. granted 58 U.S.L.W. 3614 (1990). See also Mary E. Becker, "From Muller v. Oregon to Fetal Vulnerability Policies," 53 U. Chi. L. Rev. 1219 (1986).

or unborn child." Id. at 219. The Margaret S. I court rejected a claim that the statute was unconstitutionally vague. The court applied dictionary definitions of "therapeutic" ("of or relating to the treatment of disease or disorders by remedial agents") and "remedial" ("intended for a remedy or for the removal or abatement of a disease or of an evil") to arrive at a conclusion that the Louisiana legislature could not have meant to punish practitioners for unsuccessful experiments: "Since experimentation itself involves the chance of failure, the legislature could not have meant that only successful experimentation would be therapeutic or it would have said so." Id. at 219. The legislature must have only meant to forbid procedures not intended to benefit the fetus: "Regardless of whether he can calculate the odds of success, a doctor knows whether an experiment is intended to help a patient. If it is so intended, then it is therapeutic." Id. at 219-20.

The Margaret S. I court then went on to claim that the statute was no impediment to doctors performing procedures such as amniocentesis, since amniocentesis, although not therapeutic to the fetus, was not an "experiment" but a "test". The court took its definition of "test" from the dictionary ("an act or process that reveals inherent qualities") and also its definition of "experiment " a tentative procedure. . . adopted in uncertainty as to whether it will answer the desired purpose or bring about the desired result.") Id. at 221. The court concluded that "Doctors do not experiment upon people when they conduct such routine tests." Id.

This court finds the reasoning in Margaret S. I unpersuasive. Margaret S. I attempts to draw a distinction between "experiment and "test" which simply does not exist. The dictionary definitions used by the court could easily be exchanged, since an experiment could be described as "an act or process that reveals inherent qualities" and a test is sometimes "a tentative procedure. . . adopted in uncertainty as to whether it will answer the desired purpose...."[4] The

4.) The Oxford English Dictionary also does not draw the kind of clear distinctions between these terms that the Margaret S. I court sees. Its use of the word "test" to define "experiment" suggests part of the problem. The OED defines "experiment" as, variously "The action of

key distinction, as the Margaret S. I court seems to implicitly recognize, lies in the certainty and predictability of the procedure ("Doctors do not experiment upon people when they conduct such routine tests." Id. (Emphasis added)). And if certainty or predictability are the keys, a test is as likely to be uncertain as an experiment.

For example, amniocentesis, which is now routinely performed, could have been described as "a tentative procedure" ten to fifteen years ago. Chorionic villi sampling, far less frequently performed, while it "reveals inherent qualities," is still regarded by most as "a tentative procedure." Even in vitro fertilization, although explicitly permitted by the statute, would be hard-pressed to pass muster as a "test" rather than an "experiment" under the Margaret S. I definitions: with a 12-20% success rate ("In Vitro Fertilization-Embryo Transfer in the United States: 1988 Results from the IVF-ET Registry," 53 Sterility 13 (January 1990)), in vitro could be accurately described as "a tentative procedure... adopted in uncertainty as to whether it will answer the desired purpose."

It was because of this inability to draw meaningful distinctions between "testing" and "experimentation" that the Fifth Circuit struck down a revised version of Louisiana's fetal experimentation law. Margaret S. v. Edwards, 794 F.2d 994 (5th Cir. 1986) (Margaret S. III). [5] (The court notes that, although the Margaret S. III court was construing a differ-

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(Footnote 4 continued) trying anything, or putting it to proof; a test, trial... An expedient or remedy to be tried.... A tentative procedure; a method, system of things, or course of action, adopted in uncertainty whether it will answer the purpose.... An action or operation undertaken in order to discover something unknown, to test a hypothesis, or establish or illustrate some known truth." The word "test" is variously defined as: "That by which the existence, quality, or genuineness of anything is or may be determined... the testing... or trial of the quality of anything; examination, trial, proof.... The action or process of examining a substance under known conditions in order to determine its identity or that of one of its constituents."

5.) It is not necessary to discuss Margaret S. II, reported as Margaret S. v. Treen, 597 F. Supp. 636 (E.D. La. 1984), since Margaret S. III supersedes it.

ent statute from the Margaret S. I court, the issue of vagueness in the failure to define "experimentation" was precisely the same for both.[6]

The Fifth Circuit found

> that physicians do not and cannot distinguish clearly between medical experiments and medical tests. As the expert witness pointed out, every medical test that is now "standard" began as an "experiment" that became standard through a gradual process of observing the results, confirming the benefits, and often modifying the technique. . . at one end [are] things that are obviously standard tests and [at] the other end things that are complete experimentation. But in the center there is a very broad area where diagnostic procedures of testing types overlap with experimentation procedures... even medical treatment can be reasonably described as both a test and an experiment. This must be true whenever the results of the treatment are observed, recorded, and introduced into the data base that one or more physicians use in seeking better therapeutic methods. The whole distinction between experimentation and testing, or between research and practice, is therefore almost meaningless in the medical context.

Id. at 999.

The Illinois statute suffers from the same problems of vagueness as the Louisiana law. The legislature's failure to define "experiment" and "therapeutic" means that physicians cannot be sure whether certain procedures - such as chorionic villi sampling or embryo transfer - are illegal. Such an uncertainty is inevitable when, on the one hand, the status of many current technologies cannot be classified as

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6.) The revised Louisiana statute provided: "No person shall experiment on an unborn child or a child born as the result of an abortion, whether the unborn child or child is alive or dead, unless the experimentation is therapeutic to the unborn child or child. Margaret S. v. Edwards, 794 F.2d at 998.

"routine," and on the other hand, procedures that could be classified as routine would have been illegal ten years earlier because they were more tentative and uncertain than today and therefore, under the reasoning of Margaret S. I, experimental. It is of course possible that the legislature really did mean to freeze medical advances in this nascent field at their present stage. What is medically myopic is not necessarily unconstitutional. A court should be hesitant to find such a legislative intent, however, when it places physicians such as Dr. Lifchez in the bizarre position of knowing that "experimentation" in amniocentesis made it legal, while "experimentation" in chorionic villi sampling may always be illegal. The fact that many current procedures fall within the twilight zone between experiment and test, coupled with a lack of consensus as to how these terms should be defined in the first place, leaves it hopelessly uncertain as to which procedures are allowed and which are forbidden.

B. THERAPEUTIC INTENT

The defendants claim that the scienter requirement in § 6(7), "Intentional violation of this section is a Class A misdemeanor, saves it from being unconstitutionally vague. It is true that a scienter requirement can do this for a statute. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982) ("The Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to adequacy of notice to the complainant that his conduct is proscribed.") See also Colautti v. Franklin, 439 U.S. 379, 395 (1979)(Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea.") However, a scienter requirement cannot save a statute such as § 6(7) that has no core of meaning to begin with. See Colautti at 395 n.13 ("The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain, quoting Screws v. United States, 325 U.S. 91, 101-102 (1945) (plurality opinion)). See also Note, "The Void-for-Vagueness Doctrine in the Supreme Court," 109 U.Pa.L.Rev. 67, 87 n.98 (1960):

> Yet it is evident that, unless the Court has been fooling itself in these cases [where a scienter requirement mitigated a law's vagueness], the 'scienter' meant must be some other kind of scienter than that traditionally known to the common law - the knowing performance of an act with intent to bring about that thing, whatever it is, which the statute proscribes, knowledge of the fact that it is so proscribed being immaterial. . . Such scienter would clarify nothing; a clarificatory 'scienter' must envisage not only a knowing what is done but a knowing that what is done is unlawful or, at least, so 'wrong' that it is probably unlawful.

The intent requirement applies differently to each of the three kinds of procedures that fall within the ambit of § 6(7). As already discussed in connection with the Margaret S. cases, the legality of diagnostic or screening procedures such as amniocentesis and chorionic villi sampling will depend on whether they are "tests" or "experiments." If a practitioner is unable to tell whether a procedure he is about to perform is an experiment or a test, grafting on a requirement that he intend it to be one or the other does not mitigate the vagueness of what is being forbidden. In other words, while the physician may take comfort in the fact that he is administering a test in good faith, he still does not know which tests are tests and which are experiments. To the extent that amniocentesis and chorionic villi sampling (or attempts to improve them) may be experimental, they are almost certainly illegal under § 6(7). They are designed to give information about fetal development, and often aid women in making a decision about whether or not to have an abortion. Considering in addition the risk factor of spontaneous abortion from these procedures, they can hardly be called therapeutic to the fetus, no matter the practitioner's intent.

The intent requirement is more complicated with regard to the second class of procedures that Dr. Lifchez performs, procedures such as in vitro fertilization which are designed to produce an embryo. Dr. Lifchez argues that § 6(7) requires his experiments to be successful. Unless a procedure "is

therapeutic to the fetus," he fears, he will be criminally liable. The defendants argue that the only thing inhibiting Dr. Lifchez in his efforts to improve in vitro fertilization through experimentation is his own unreasonable interpretation of § 6(7): as long as a practitioner intends his procedure to help the fetus, § 6(7) is no bar. There is support for the defendants' interpretation in the legislative debates:

> Dunn: If a fertilized egg is implanted in the womb of a woman and dies, is that process therapeutic to that particular fertilized egg?
>
> O'Connell: No.
>
> Dunn: Now, is the general process that I am talking about here. . .
>
> O'Connell: Excuse me, Representative Dunn.
>
> Dunn: Yes.
>
> O'Connell: The question that you proffered was that if the fertilization, the implantation fails, is that therapeutic to the fertilized egg?
>
> Dunn: Yes.
>
> O'Connell: Well, the best answer to that is that this is not a prohibition on therapeutic.... This is not a prohibition on in vitro fertilization. It is not a prohibition on therapeutic treatment for the benefit of the fetus.

Exhibit A, pp. 75-76. Up to this point, it would appear that merely the intent to produce a fertilized egg is enough to avoid § 6(7)'s criminal sanctions.

However, later in the debate, it is less certain that this is the case. As the Representatives discussed various medical techniques that § 6(7) might affect, it becomes clear that anything other than in vitro fertilization has a most uncertain legal status:

> O'Connell: Well, the intent is for in vitro fertilization to be permitted within the confines of this law. If it is an experimentation without the intent to result in in vitro fertilization, it would be prohibited under this law.

Exhibit A, p. 78. This statement leaves procedures such as embryo transfer and in vivo fertilization in a kind of legal limbo. In vivo fertilization involves fertilizing an ovum in a second woman's uterus through artificial insemination, and then flushing the embryo for implantation in the woman trying to get pregnant. In a broad sense, it could be argued that such an experimental procedure is intended to be therapeutic to the embryo. However, it is equally plausible to interpret the removal of a gestating embryo from one uterus to another, exposing it to the considerable risk associated with embryo transfer ("In Vitro Fertilization - Embryo Transfer in the United States: 1988 Results from the IVF-ET Registry," 53 Sterility 13 (January 1990); Maria Bustillo et al., "Infertile Women: Preliminary Experience," 251 Journal of the American Medical Association 1171 (1984)), as evidence of therapeutic intent directed only toward the woman who wishes to bear her own child. A therapeutic intent (or at least the most therapeutic intent) toward the embryo would leave it alone to develop in the uterus in which it was fertilized.

While the defendants argue in their briefs for the broadest possible meaning of "intent" that a procedure be therapeutic to the fetus, the legislative debates suggest a far less liberal interpretation:

> O'Connell: . . . We're trying to make the legislative intent in the language of the legislation to be as clear as possible that it shall not prohibit in vitro fertilization.
>
> Greiman: So, that research on in vitro fertilization and techniques of in vitro fertilization techniques.
>
> O'Connell: I didn't say research or techniques. In vitro....

> Greiman: Well, what does it mean then, if it means anything?
>
> O'Connell: The actual in vitro fertilization is not prohibited under this measure.

Exhibit A, pp. 117-118. While this passage does not constitute a complete exegesis of therapeutic intent, a practitioner looking for clues as to what the legislature meant could reasonably conclude that § 6(7)'s sponsor understood his bill to permit only in vitro fertilization as it was then practiced, not further research on in vitro fertilization, not refining the techniques relating to in vitro fertilization, and certainly not an experimental procedure such as in vivo fertilization.

There is an additional inconsistency between the position taken by defendants in their briefs and the apparent intent of the legislature. At several points, defendants press a purely subjective meaning of therapeutic intent: "Therefore, if a doctor is performing an 'experiment' that is intended to help the fetus, then that action is not criminal, no matter what the final outcome of the experiment might be." Defendant Daley's Brief in Support of Summary Judgment at 4. See also Defendant Hartigan's Reply Brief in Support of Summary Judgment at 2: "But where a person's intent is ultimately to benefit the fetus, no violation of Section 6(7) has occurred." Under such a liberal description of therapeutic intent, it is difficult to imagine an experiment that a researcher could not plausibly claim was intended to ultimately benefit the fetus. Even the "Orwellian nightmare" of injecting a fetus with, say, a rubella vaccine (Exhibit A, p.116), either not knowing the effect of such an experiment or even strongly suspecting that it might be harmful, could be justified as a subjective hope to inoculate the fetus (maybe this time, with this dosage, it would work). Under defendants' subjective standard of therapeutic intent, only the most malevolently conceived experiments, such as injecting the fetus with a known harmful agent with the intent to kill it, would be forbidden. Such a subjective standard of criminal intent would be, to say the least, novel in the

criminal law. See Wayne R. LaFave and Austin W. Scott, Jr., Criminal Law §§ 3.5 and 3.7(f) (West 2d ed. 1986). And yet this cannot be all that § 6(7) proscribes; that much is clear from the legislative debates:

> O'Connell: There has been testimony presented during the course of this Bill being considered by the General Assembly that, in fact, wholesale experimentation of fetuses has occurred in other states . . . All we're trying to address is a legitimate, realistic attempt to avoid the damaging non-life considering fetal experimentation....

Exhibit A, p. 83.

> O'Connell: I was advised that there was study or experimentation in New Jersey. There was also a study cited in the New England Journal of Medicine in which 35 pregnant women were injected with a live rubella vaccine virus to determine the effects of the virus on aborted fetuses. As for this state, I do not know of any experimentation that is going on at present, but the legislation is designed prospectively to prohibit any potential experimentation.

Exhibit A, p. 116.

> Greiman: What is research? You stick your thumb in your navel and think about it. I mean, don't you have to do things to research or no? What do you do?
>
> O'Connell: Well, you don't have to take a live fetus and inject it with some substance to determine whether or not that substance will, in fact, result in a death or disfigurement or some damage to that fetus .

Exhibit A, p. 11a.

> O'Connell: . . .The Bill is addressed to situations where a quantity of fetuses are laid out on a counter, for example, and injected with some kind of vaccine without any care as to what the well being of that fetus is, just to observe the affects that a certain vaccine might have.

> These may have been purchased by a medical facility. They may have been donated by a medical facility but. . . and nevertheless, they are live fetuses that many of us in this chamber consider to be human beings. There has been suggestions that since nothing has happened in Illinois that we know of, that we shouldn't support this Bill. I would submit that we know enough in other parts of the country, other efforts to, under the name of experimentation, take wholesale liberties with fetuses under the guise of experimentation.

Exhibit A, pp. 122-23.

Focusing on therapeutic intent does little to mitigate the inherent vagueness of § 6(7) as it applies to in vitro fertilization and related procedures.

The intent requirement is also of little help in clarifying the legality of procedures which Dr. Lifchez may perform on a pregnant woman that have an unknown effect on the fetus, procedures such as testing for correal carcinoma. This issue of transferred intent was addressed by the bill's sponsor:

> The last point that the Governor makes in his veto message is that experimentation on a mother could result in an effect. . . an indirect effect on the fetus and, therefore, result in preventing a woman, for example, as he points out in his message, suffering from cancer from being given certain medical treatments. I would submit that that is a misplaced concern. The Bill is quite specific in that we are addressing experimentation directly on the fetus. And the intent is on the fetus and not on the mother so that there cannot be, in effect, a transferred intent, if the experimentation is to be on the mother, the result to experimentation on the fetus.

Exhibit A, p. 74.

The legislators may not have intended that there be a difficulty with "transferred intent", but they did not choose language to avoid this problem. Certainly, a pregnant

woman can consent to any procedure she likes, including an experimental one. However, because of the inextricable link between her and her fetus, and because many substances will cross the placenta when administered to the woman, the "intent" to experiment on the woman could be easily interpreted as an "intent" to experiment upon the fetus. Considering the unknown effects of even many common drugs upon fetal development (Williams Obstetrics at 260), it is natural to expect that physicians will have at least a subjective intent to discover the effect of a drug upon the fetus when that drug is given to the pregnant woman. According to the defendants, even indifference to the fetus during such a procedure could be actionable: "The conduct that is prohibited is the conduct of a person not trying to help the fetus by experimentation." Defendant Daley's Brief in Support of Summary Judgment at 4. See also Defendant Hartigan's Brief in Support of Summary Judgment at 9: "The statute only makes sense when it is interpreted to prohibit only experimentation not designed to benefit the fetus." (Emphasis in original). [7]

The uncertainty that is inherent in § 6(7) derives from its failure to define the key terms "experiment" and "therapeutic". The lack of consensus as to what these words mean, coupled with the explosion of technology in the field of reproductive endocrinology, make it impossible for Dr. Lifchez to know which of the many procedures he administers may be forbidden. When there is no clear core of meaning to a statute, "intent" does not mitigate the vagueness of the language used. Because § 6(7) does not alert persons of common intelligence to what conduct is unlawful, it is unconstitutionally vague and violates the Fourteenth Amendment.

7.) It is not the province of this court to write statutes. However, the court notes that, if the Illinois legislature were to look for Ways to cure the vagueness of § 6(7) - especially the provision's failure to distinguish diagnostic from other types of procedures - models do exist. See, e.g., New Mexico Stat. Ann. § 24-9A-l(d) (1985); Rhode Island Gen. Laws 11-54-1(b) (Supp. 1989); North Dakota Cent. Code § 14-02.2-01(3) (1989); Mass. Ann. Laws ch. 112, § 12J(a) (1985).

REPRODUCTIVE PRIVACY [8]

Section 6(7) of the Illinois Abortion Law is also unconstitutional because it impermissibly restricts a woman's fundamental right of privacy, in particular, her right to make reproductive choices free of governmental interference with those choices. Various aspects of this reproductive privacy right have been articulated in a number of landmark Supreme Court cases, including Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down statute which forbid use of contraceptives on grounds that statute invaded zone of privacy surrounding marriage relationship); Eisenstadt v. Baird, 405 U.S. 438 (1972) (Striking down statute forbidding distribution of contraceptives to unmarried persons on equal protection grounds, but observing in dicta that: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. Id. at 453); Roe v. Wade, 410 U.S. 113 (1973) (establishing unrestricted right to an abortion in first trimester); and Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976) (striking down provisions of abortion statute requiring spousal consent and parental consent). In Carey v. Population Services International, 431 U.S. 678 (1977), the Court struck down a statute which forbid the sale of contraceptives to minors, forbid anyone other than pharmacists from distributing contraceptives to anyone, and forbid all advertising of contraceptives. The Court reviewed its prior privacy cases and declared that

> The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding

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8.) Although neither party has raised the issue, the court notes that Dr. Lifchez has standing to assert the reproductive privacy rights of his patients. See Singleton v. Wulff, 428 U.S. 106, 117-18 (1976) and Doe v. Bolton, 410 U.S. 179, 188-89 (1973).

> unconstitutional a statute prohibiting the use of contraceptives. . . and most prominently vindicated in recent years in the contexts of contraception. . . and abortion.

Id. at 685 (citations omitted).

Section 6 (7) intrudes upon this "cluster of constitutionally protected choices." Embryo transfer and chorionic villi sampling are illustrative. Both procedures are "experimental" by most definitions of that term. Both are performed directly, and intentionally, on the fetus. Neither procedure is necessarily therapeutic to the fetus. In embryo transfer, it is not therapeutic to remove the embryo from a woman's uterus after it has been fertilized and expose it to the high risk associated with trying to implant it in the infertile woman. In chorionic villi sampling, it is not therapeutic to the fetus to invade and snip off some of its surrounding tissue. Both embryo transfer and chorionic villi sampling violate any reasonable interpretation of § 6(7).

Both procedures, however, fall within a woman's zone of privacy as recognized in Roe v. Wade, Carey v. Population Services International, and their progeny. See also John A. Robertson, II The Right To Procreate and In Utero Fetal Therapy, " 3 J. Leg. Med. 333, 339 (1982). Embryo transfer is a procedure designed to enable an infertile woman to bear her own child. It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy. Chorionic villi sampling is similarly protected. The cluster of constitutional choices that includes the right to abort a fetus within the first trimester must also include the right to submit to a procedure designed to give information about that fetus which can then lead to a decision to abort. Since there is no compelling state interest sufficient to prevent a woman from terminating her pregnancy during the first trimester, Roe v. Wade, 410 U.S. at 163; Akron v. Akron Center for Reproductive Health, 462 U.S.

416, 450 (1983), there can be no such interest sufficient to intrude upon these other protected activities during the first trimester.

By encroaching upon this protected zone of privacy, § 6(7) is unconstitutional.

CONCLUSION

The court grants Dr. Lifchez' motion for summary judgment and denies the defendants' motion for summary judgment. Section 6(7) of the Illinois Abortion Law is unconstitutional and the defendants are permanently enjoined from enforcing it.

ENTER:

Ann Claire Williams, Judge
United States District Court

Dated: APR 26, 1990

APPENDIX I

December 8, 1989

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 82 C 4324 - Judge Ann Claire Williams

Case: LIFCHEZ v. HARTIGAN (SMITH v. HARTIGAN)

Status hearing held.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AARON LIFCHEZ, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	No. 82 C 4324
	)	
NEIL F. HARTIGAN and	)	Chicago, Illinois
RICHARD M. DALEY,	)	December 8, 1989
	)	9:00 a.m.
Defendants.	)	Status

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ANN C. WILLIAMS

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THE CLERK: 82 C 4234, Smith versus Hartigan (LIFCHEZ v. HARTIGAN) on a status, third call.

COUNSEL FOR THE ACLU: Good morning, Your Honor. I'm very embarrassed for the situation here. I was told by an attorney in my office the name of the case,

and I believe they got the name wrong.

I'm here on behalf of the ACLU. I'm from Neal, Gerber, Eisenberg & Lurie, and I'm here in place of Fran Krasnow. I believe that this may be the case. It's an in vitro fertiliza-
tion-

THE COURT: Right.

COUNSEL FOR THE ACLU: I'm terribly sorry for the mix up.

THE COURT: All right.

COUNSEL FOR THE ACLU: The last time Miss Krasnow was here there had been an amendatory veto by Governor Thompson on the amendment to the statute. The house overrode the veto and at that time we were waiting to see if the senate would override it. The senate has not overrode the veto, so the statute remains the same, and our briefs are now current, which means at your convenience the Court can rule on the cross motions.

THE COURT: All right., Then I will consider it as of today. I'm going to lift the stay.

COUNSEL FOR THE ACLU: Okay.

THE COURT: Because I've stayed ruling on it. I'll lift the stay as of today's date and put it in my stack of briefs, and it will be ruled on in due course.

COUNSEL FOR THE ACLU: Thank you, Your Honor.

THE COURT: All right. Thank you.

APPENDIX K

September 29, 1989

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 82 C 4324 - Judge Ann Claire Williams

Case: LIFCHEZ v. HARTIGAN (SMITH v. HARTIGAN)

Status hearing held and continued to December 8, 1989 at 9:00 a.m.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AARON LIFCHEZ, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 82 C 4324
	)	
NEIL F. HARTIGAN and	)	Chicago, Illinois
RICHARD M. DALEY,	)	September 29, 1989
	)	9:00 a.m.
Defendants.	)	Status

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ANN C. WILLIAMS

APPEARANCES:

For the Plaintiff: NEAL, GERBER, EISENBERG
& LURIE, by
MS. FRANCES H. KRASNOW
208 South LaSalle Street
Chicago, Illinois 60604

Court Reporter: Valarie M. Harris
Official Court Reporter
219 South Dearborn Street, Room 1928
Chicago, Illinois 60604 (312) 435-6891

THE CLERK: 82 C 4324, Smith versus Hartigan on a status, second call.

MS. KRASNOW: Good morning, Your Honor. Frances Krasnow on behalf of the plaintiffs.

Your Honor, when we were before the Court last time I believe that Miss Connell reported to the Court that there was a bill that was pending that was likely to be passed and we were waiting to see whether the governor would sign it.

THE COURT: Right.

MS. KRASNOW: Governor Thompson did issue an amendatory veto. He vetoed the portion of the bill that would prohibit the use of fetal tissue resulting from an abortion for any research purposes, which means that we are now going to wait and see what happens on the possibility of an override of the veto.

THE COURT: How many days do we have for that?

MS. KRASNOW: Well, there's apparently one week in October, Your Honor, and one week in November. And in discussing this with other counsel we think perhaps a status in December would make sense. At that point we would be able to perhaps narrow the issues that are presented in the cross motions for summary judgment and this Court would have —

THE COURT: Okay. Then let's set it for December 8th at 9:00.

MS KRASNOW: 9:00? Thank you, Your Honor.

THE COURT: All right.

APPENDIX M

July 25, 1989

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 82 C 4324 - Judge Ann Claire Williams

Case: LIFCHEZ v. HARTIGAN (SMITH v. HARTIGAN)

Status hearing held and continued to September 29, 1989 at 9:00 a.m.

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

AARON LIFCHEZ, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 82 C 4324
	)	
NEIL F. HARTIGAN and	)	Chicago, Illinois
RICHARD M. DALEY,	)	July 25, 1989
	)	9:30 a.m.
Defendants.	)	Status

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ANN C. WILLIAMS

APPEARANCES:

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For Neil F. Hartigan: MS. PAULA J. GIROUX
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Chicago, Illinois 60601

For Richard M. Daley: MR. HAROLD E. McKEE III,
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Court Reporter: Valarie M. Harris
Official Court Reporter
219 South Dearborn Street
Room 1928
Chicago, Illinois 60604
(312) 435-6891

THE CLERK: 82 C 4324, Smith versus Hartigan(LIFCHEZ v. HARTIGAN) on a status.

MS. CONNELL: Good morning, Your Honor. Colleen Connell for plaintiffs.

MS. GIROUX: Good morning, Your Honor. Paula Giroux for defendant Hartigan.

MR. MC KEE: Good morning, Your Honor. Harold McKee for defendant Daley.

THE COURT: All right. Since the Supreme Court ruled, you know, we were in a position to address this matter. I had my clerk call the parties to see where things stood in light of the ruling, if that would change things, do I still need to rule on it,, and there was some indication that we might need to wait for some additional legis - - I wanted to find out the status of that and see where the parties were because I can continue the stay if necessary, but I'm ready to get this done. We could have it done in the next week.

MS. CONNELL: Your Honor, if I can suggest a short stay, maybe continuing the stay for another 609 days. As I told your clerk, the Illinois General Assembly did enact a bill which amended Section 6(7), which is

the section at issue here. It's house bill 2693. I have unfortunately not a final copy. It's just a copy with all the different amendments. The enrolled version isn't ready from Springfield yet.

The lobbyist who is employed by the ACLU says there has been a substantial amount of opposition to parts of the bill by the medical profession and that several professional societies have contacted the governor's office about the possibility of an amendatory veto on this. how credible that is, how likely that is I'm really not in a position to judge. But the bill would change the statute at issue, although it does preserve the primary parts that the parties briefed, namely, the prohibition on experimentation unless such experimentation was therapeutic to the fetus.

So from my vantage point it appears that continuing the stay for another 60 days to see what action, if any, the governor takes on that might be the most efficacious use of all of our time.

THE COURT: All agree or any objection to the Court continuing it?

APPENDIX O

June 14, 1989

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 82 C 4324 - Judge Ann Claire Williams

Case: LIFCHEZ v. HARTIGAN

This case is stayed pending the United States Supreme Court's ruling in *Webster v. Reproductive Health Services*, 88-605.

(3)

No. 90-922

In The
Supreme Court of the United States
October Term, 1990

ANDREW D. SCHOLBERG, et. al.,

Petitioners,

v.

AARON S. LIFCHEZ, et. al.,

Respondents.

AMICI BRIEF OF GEORGE LUCAS, THE NATIONAL BLACK COALITION FOR TRADITIONAL VALUES, AND OTHER BLACK LEADERS AND BLACK ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ERNEST L. JOHNSON
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TABLE OF CONTENTS

Note: This Amici Brief is being filed with the consent of all of the parties. Consents are on file with the Office of the Clerk.

TABLE OF AUTHORITIES

Federal Cases

Federal Constitutional Provisions

State Statutes

Miscellaneous

INTEREST OF AMICI

The amici are Black leaders and Black organizations from throughout the United States of America who are shocked that unborn children are soon to be sold for experimentation and body parts in the State of Illinois since the Illinois law prohibiting such abominations has been struck down by the federal courts to date.

As the decendants of slaves and fully aware of the contribution that Black Americans have made to this Great Nation, the amici stand firmly against the idea of unborn children being considered the chattel property of their mothers. The sale of unborn children is slavery which must not be allowed to raise its ugly head again in this Great Nation. To suggest that privacy rights extend outside a woman's body proves the unsoundness of *Roe*.

The amici strongly urge that the Supreme Court of the United States stop this tragedy before it begins and not faint before the task as the majority did in the infamous *Dred Scott* decision.

George Lucas and the
National Black Coalition for Traditional Values
Petersburg, Virginia

Rev. Hiram Crawford and the
Pro-Life Pro-Family Coalition
Chicago, Illinois

Dr. Dolores Bernadette Grier and the
Voters Against Abortion
New York, New York

Pastor Joe Dallas and the
Blacks for Life
Milwaukee, Wisconsin

Rev. E. W. Jackson, Sr., and the
Exodus Movement
Boston, Massacusetts

Rev. Cleveland Sparrow and the
Sparrow World Baptist Church
Washington, D.C.

Barbara Bell and the
Massachusetts Blacks for Life
Medford, Massachusetts

Rev. St. George Cross and the
Society for the Advancement of Families Everywhere
Randalls Town, Maryland

Pastor Greg Keith and the
Black Alliance for the Family
New Brighton, Minnesota

SUMMARY OF ARGUMENT

As Black Americans, we are well aware that the infamous *Dred Scott* decision denied the humanity of our ancestors who helped form this great nation. When the Court denied standing to Dred Scott, he was denied the right to protect himself from any wrong--no matter how unjust.

As Black Americans, we are also well aware that the infamous *Roe v. Wade* decision has decimated our people. As Black Americans constitute an ever dwindling percentage of the American people, we have the largest percentage of abortions to live births. The number of Black Americans whose young lives have been terminated by abortion has already far exceeded the number of Black Americans who were freed by the Emancipation Proclamation and the Civil War.

And now once again the federal courts have chosen to deny humanity. The District Court and the Appellate Court denied standing to Baby Scholberg. Just like Dred Scott, she was denied the right to protect herself from any wrong--no matter how unjust.

If this Court does not grant certiorari, Black unborn children will be sold into the slavery of experimentation and the medical market for body parts. Make no mistake--young Black unborn babies procured from financially desperate Black expectant mothers will provide the majority of these children. Once again, Black Americans will be slaves. Only reversing both *Dred Scott* and *Roe v. Wade* ab initio can right the wrongs that these decisions have perpetrated. As Black Americans, we ask for justice for all.

ARGUMENT

The United States Constitution, Amendment XIII, provides that:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Nowhere in the the Thirteeenth Amendment is either the word "person" or "citizen" mentioned. Clearly, slavery would include the sale of any "citizen" or any "person" regardless of whether that "person" is a "citizen." But the Thirteenth Amendment is much broader than that.

At the time of the enactment of the Thirteenth Amendment the vast majority of Black Americans were not recognized as either "citizens" nor "persons" under then recent judicial decisions. See *Dred Scott v. Sandford*, 60 U.S. 393, 16 L.Ed. 691 (1857).

The Thirteenth Amendment extended to all Black Americans who were then considered non-persons.

The original intent of the Thirteenth Amendment is to prohibit the sale of any human being--whether that human being is a citizen, a person or a non-person.

The principle intent and the principles intended by the Thirteenth Amendment bars the sale of unborn children. The sale of an unborn child is an act of slavery.

Simply stated, it is unconstitutional to sell, to offer to sell, to buy and to offer to buy an unborn child within the United States, or any place subject to their jurisdiction.

It matters not that the sale might have originated while the child was still in utero. It matters not that the child is not considered a person under either state or federal law. The sale is still an act of slavery.

We realize that some medical knowledge might be gained by selling unborn children for experimentation. Certainly, the Nazi experiments on concentration camp victims did yield some medical knowledge. But that did not make these actions of the Nazis any less reprehensible or any more justified. In like manner, selling unborn children today is reprehensible and not justified. But what is most important, it is unconstitutional.

How then can such an abominable practice be even suggested? Certainly, when mention is made of transferring brain tissue to Alzheimer's and Parkinson's patients, we are speaking of fully formed babies. Similarly, when mention is made of transferring pancreatic tissue to diabetic patients, we are also speaking of fully formed babies. And when mention is made of scalping the child and transferring the scalp to balding men, we are also speaking of fully formed babies.

Moreover, we must not forget that only live tissue can be used in such transplants. Nancy Cruzen suffered irreversible brain damage through being denied oxygen for just six minutes. Latter term saline abortions in which the child dies in utero will not work. The child is dead in utero for too long. The tissues and organs of the unborn child are no longer suitable for transplanting.

The taking of organs from fully formed babies can be done either through caesarian abortions or induced abortions in which the child is born live. And while the child is beginning to die, since he is denied proper medical care, the organs are removed from the child's still living body.

How can an expectant mother decide that a child be harvested for body parts when the same child is of sufficient maturity to survive sans utero in a hospital unit specifically designed for premature babies of the same maturity? And the child can be alive sans utero when the organs are removed from his little body?

The answer is found in the tragic *Roe* decision. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). If ever a case has proven unsound in principle and unworkable in practice, *Roe* is the one.

In the instant case the District Court abandoned both the case and controversy requirement and the limitations imposed upon facial void for vagueness challenges. The Appellate Court failed to acknowledge the legal personhood of unborn children in the State of Illinois since the *Webster* decision. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), and Illinois Revised Statutes, Chapter 38, Section 81-21. Both courts failed to recognize the apparent constitutional violations of the Thirteenth Amendment.

We realize that the Court is waiting for an appropriate case to thoroughly review the *Roe* decision. We strongly believe that this case is the appropriate case. No case more clearly presents the unworkability of *Roe*. No case more clearly presents the unsoundness of *Roe*. And if not to stop the harvesting of the unborn, when?

Moreover, we firmly believe that the original intent of the Consitution and the governing principles intended by that great document require the explicit reversal of *Roe* and more.

First, each and every State of this Great Nation must consider the life and liberty interests of all unborn children from conception.

Second, each and every State of this Great Nation has an affirmative obligation to safeguard the life and liberty interests of every viable unborn child. All viable abortions must be prohibited unless necessary to save the life of the expectant mother and even then all necessary efforts must be made to save the life of the child.

If in the exercise of her first liberty interests found in *Griswold v. Connecticutt*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), a woman becomes pregnant, her second liberty interests must be balanced against the life and liberty interests of her unborn child. Once a child becomes viable, the expectant mother must allow the unborn child to live.

Certainly, the responsibilities and obligations of the expectant father are established by a single act of intimacy. He can be ordered to pay the medical expenses incurred in the birth, child support, medical and dental expenses incurred during the minority of the child and college or trade school expenses upon the child reaching adulthood. All of these responsibilities and all of these obligations come from one act of intimacy.

In like manner, an expectant mother carrying a viable child should have the responsibility and obligation to give the child life.

Moreover, the infamous *Dred Scott* decision must be reversed. We realize that the purpose of the Thirteenth Amendment is to end slavery and involuntary servitude of Black Americans. We realize also that the purpose of the Fourteenth Amendment was to establish citizenship of Black Americans. Finally, we realize that these two Amendments to the Constitution effectively reverse the result of the infamous *Dred Scott* decision.

However, our forefathers who helped form this Great Nation prior to the enactment of these two Amendments are still not considered sufficiently human to protect themselves in court from any wrong--no matter how unjust.

Our forefathers are one of only two groups of Americans whose total humanity is still denied. The other group is unborn children.

The infamous *Dred Scott* case was wrongly decided then and must be reversed ab initio now. Such a reversal would allow every Black American to look to his or her ancestry with pride. And such a reversal would allow the Court to recognize the life and liberty interests of unborn children. Only then will there be justice for all.

Finally, we note that the petitioners have dealt extensively with the elements of intervening as of right, with the requirement of being an intervenor as of right being subsumed within the more demanding requirements of being a non-joined indispensable party.

The threshold element of timeliness is met in four ways.

First, since a court itself can raise the issue of non-

joined indispensable parties even on appeal, the motion of non-joined indispensable parties to intervene at the district court level must be deemed timely as a matter of law. To hold otherwise--allowing the court itself to raise the issue at a late time while on appeal, but not allowing the non-joined indispensable parties to raise the issue themselves--would erect a logically inconsistent framework within the law.

Second, for similar reasons a motion to intervene at the district court level to raise issues of the court's subject matter jurisdiction must be deemed timely as a matter of law, for such issues can likewise be raised sua sponte on appeal.

Third, the person whose interests were sought to be upheld, Baby Scholberg, was incompetent throughout the course of the proceedings. How can an incompetent be charged with being untimely?

Fourth, caught between the need on the one hand to act swiftly to defend their interests once it can be seen clearly that the representation can not be deemed adequate, and the need on the other hand to refrain from troubling the court with a motion to intervene prior to that time, the motion by the petitioners to intervene in the district court was made at precisely the time that best complies with these two opposite considerations. See *United Airlines v. McDonald*, 423 U.S. 385 (1977)

As to the element of having an interest in the matter, the interest of not being experimented on or sold is plainly seen.

As to the element of that interest being impaired, as a practical matter, if intervention is not granted, any

delay caused by pursuing collateral proceedings would expose the unborn children of the State of Illinois to death or maiming during the pendency of the proceedings. This is a rather practical impairment of their interests.

The element of the inadequacy of the representation has already been fully discussed by the petitioners.

In conclusion, we turn to the words of Dr. Martin Luther King, Jr., when he spoke on August 28, 1963 in Washington, D.C.:

> I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident; that all men are created equal."

We truly believe that the day has come for the Supreme Court of the United States to rise up and to say no, not in America, for here we are all truly equal.

CONCLUSION

For all of the foregoing reasons, we are asking The Supreme Court of the United States of America to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 90-922

In The
Supreme Court of the United States
October Term, 1990

ANDREW D. SCHOLBERG, et. al.,

Petitioners,

v.

AARON S. LIFCHEZ, et. al.,

Respondents.

AMICUS BRIEF OF CONCENTRATION CAMP SURVIVOR EVA EDL AS AMICUS CURIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Federal Cases

Supreme Court

Seventh Circuit

Northern District of Illinois

State Constitutional Provisions

State Statutes

Miscellaneous

INTEREST OF AMICUS

The amicus, Eva Edl, was a concentration camp survivor from World War II and its aftermath. Atrocities were legally sanctioned since the victims were non-persons.

Being denied her personhood and then surviving for nineteen months in the Gakovo concentration camp, Eva Edl wants to share her unique perspective with the Court and present the urgent need to recognize the personhood of all human beings.

Eva Edl strongly supports the Petition for Writ of Certiorari which is pending before the Court.

SUMMARY OF ARGUMENT

During World War II concern had been spreading within the Third Reich as to what the effect upon the war effort would be if the concentration camp atrocities were made known to the free world.

On June 18, 1943 the Reichskommisar for the Ostland sent a communique to the Reichsminister for the Occupied Eastern Territories which included the following excerpt:

"Just imagine that these events were to become known to the enemy! And were being exploited by them! In all probability, such propaganda would be ineffective simply because those hearing and reading it would not be prepared to believe it."

Most cannot believe the horrendous atrocities which occur when a human being is denied personhood.

Most cannot believe the horrendous atrocities which will occur if the personhood of Illinois unborn children under duly enacted state constitutional and statutory provisions is not recognized by the federal judiciary.

Only the granting of the Petition for Writ of Certiorari will stop the atrocities that are about to happen.

ARGUMENT

My name is Eva Edl. I was born in what is now Yugoslavia. I am a naturalized American citizen and presently live in Aiken, South Carolina.

I wanted my attorney to express my feelings in my words. I am sorry and apologize if I do not say things that I should have or say things that I should not have.

In the 1940's when I was nine years old, I was taken to the Gakovo extermination camp in Yugoslavia. I was too young to be in one of the labor camps.

In Gakovo we were left to die of starvation, disease and exposure to the elements. Everyone was either young like myself, or old and disabled.

People began to die very quickly, approximately fifty to eighty a day. My aunt died, and my cousin died too.

The dead were thrown into mass graves of five to seven hundred people. Once the commanding officer shot a woman in front of her child and then kicked her body into a mass grave. She had refused to willingly have sex with him.

Other women were raped in sexual orgies. I was lucky. I was either too young or simply not desired by one of the guards.

Torture was common. We had no medical aid.

All of these things happened because then the law considered us non-persons. We were the property of the state.

The guards could do anything that they wanted to do. I even heard of women being dissected after being raped by the guards.

After nineteen months my family escaped. We first went to Hungary and then to Austria. In 1955 we were allowed to come to the United States.

I cannot tell you how much joy I felt to be able to come to the country that stood for freedom. My joy was complete when I became a citizen of this great country.

My life has been good. I married, had three children, and shared many wonderful years with my husband who died just this last year of cancer.

Everyone's life has its moments of joy and its moments of sadness, but there is no comparison between a life in freedom and a life in tyranny. This I know.

When I heard that the District Court in this case[1] was allowing expectant mothers to sell their unborn children, I was shocked and sick to my stomach. I thought that such things could not happen in this great country. I came here to escape such things.

How can an unborn child be the property of her mother, just as we were the property of the state in the Gakovo extermination camp? This cannot be happening here, not again, not in America.

Then I heard that the Appellate Court in this case[2]

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[1]*Lifchez v. Hartigan*, 735 F.Supp. 1361 (N.D.Ill. 1990).
[2]*Lifchez v. Hartigan*, 914 F.2d 260 (7th Cir. 1990).

would not listen to the little ones, that they had no right to be in court. They could not ask the court for help. They could not stop their own sale. How can this be?

Illinois has a law that says that an unborn child is a legal person from conception.[3] How can the courts ignore this law and not listen?

When I was in Gakovo, there was no hope, no one to write to, no one to ask for help. By law I was a non-person. No one would listen.

Every form of identification was taken from us, every piece of paper. We were no one, and the guards wanted us to know that we were no one. We were treated like animals, even worse than animals. Escape was the only hope. I was lucky. I escaped.

I am asking for hope for the little ones. They are not no one. But they cannot escape without your help. Please give the little ones the opportunity to be heard. Please listen to their little voices.

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[3]Illinois Revised Statutes, Chapter 38, Section 81-21, provides that once *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed2d 147 (1973), is modified, an unborn child in Illinois is by law recognized as a human being and as a legal person from the time of conception. Since *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), modified *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), an unborn child in Illinois is now entitled to the right to life from conception and is guaranteed equal access to the courts to allow her to protect her life and liberty interests. See Illinois Constitution of 1970, Article I, Section 12, which provides in relevant part that "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person...," and Section 2, which provides in relevant part that "No person shall be deprived of life, liberty...without due process of law nor be denied equal protection of the laws."

They do not have to be denied medical care.

They do not have to be tortured in experiments and die.

They do not have to be dissected to have their little organs taken from them and then left to die.

This is still a great country. I still believe in this country. I still have hope. Where else can a citizen like myself speak to the highest court of the land.

This is the United States. This is not the Gakovo extermination camp. But if it happens here, where are we to go? This is the only America. And I am too old to flee once again.

CONCLUSION

For all of these reasons, I am asking this Most Honourable Court, the Supreme Court of the United States of America, to grant the Petition for Writ of Certiorari.

Respectfully and reverently submitted,

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